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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH CARL STANLEY, Defendant and Appellant.	B252979 Los Angeles County Super. Ct. No. BA348056

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Jr., Judge. Affirmed in part as modified and reversed in part.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James W. Bilderback II, and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Joseph Carl Stanley was sentenced to two consecutive terms of life without the possibility of parole after a jury convicted him of murdering brothers Manuel and Roberto Romero.[1] On appeal, defendant contends, notwithstanding this court's decision in *Stanley v. Superior Court* (2012) 206 Cal.App.4th 265 (*Stanley I*), that he did not impliedly consent to a mistrial in his case, and that the Double Jeopardy Clause therefore barred his retrial. We conclude *Stanley I* is law of the case and therefore do not reexamine the merits of that opinion; thus, retrial was proper.

Defendant also contends his convictions are not supported by substantial evidence. We reject defendant's challenge to the sufficiency of the evidence. We also conclude the trial court erroneously imposed state surcharges and penalty assessments totaling $324, an inapplicable $300 parole revocation fine, and four, rather than three, $30 court facilities assessments. We therefore reverse the state surcharge, penalty assessments, and fine, and modify the judgment to remove the extra $30 assessment. In all other respects, and as modified, the judgment is affirmed.

PROCEDURAL BACKGROUND

By information filed October 14, 2009, defendant was charged with premeditated murder of Manuel and Roberto Romero (Pen. Code,[2] § 187, subd. (a); counts 1 and 2); attempted

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[1] Because the Romeros share a last name, for clarity we sometimes refer to them by their first names.

[2] Undesignated statutory references are to the Penal Code.

possession for sale of methamphetamine (§ 664, Health & Saf. Code, § 11378; count 3); and possession of a firearm by a felon with a prior (former § 12021, subd. (a)(1); count 4).[3] As to counts 1 and 2, the information alleged defendant committed multiple murders—a special circumstance under section 190.2, subdivision (a)(3)—and during the commission of the murders, defendant personally and intentionally discharged a firearm (§ 12022.53, subds. (b) [personal use], (c) [personal and intentional discharge], (d) [personal and intentional discharge causing death]). The information also alleged three 32-year-old prior convictions and one 35-year-old juvenile adjudication constituted strike priors (§ 1170.12, subds. (a)–(d); § 667, subd. (b)–(i)) and serious-felony priors (§ 667, subd. (a)(1)). Defendant pled not guilty and denied the allegations.

1. *Mistrial and Stanley I.*

On Friday, November 4, 2011, a jury was sworn to try the case. The following Monday, November 7, 2011, the court declared a mistrial and set a new trial date. On December 12, 2011, defendant moved for dismissal based on double jeopardy and also proffered a plea of once in jeopardy. The trial court denied the dismissal motion after finding defense counsel had impliedly consented to dismissal of the jury and the resulting

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[3] The Deadly Weapons Recodification Act of 2010 repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005, 16010.) Effective January 1, 2012, former section 12021, subdivision (a) (count 4) was recodified without substantive change at section 29800, subdivision (a). (Stats. 2010, ch. 711 (S.B.1080), § 4 [repealed]; stats. 2010, ch. 711 (S.B.1080), § 6 [reenacted].)

mistrial. In light of that conclusion, the trial court refused to accept the proffered plea of once in jeopardy.[4] Defendant petitioned this court for writ of prohibition and a stay was granted. On May 22, 2012, a different panel of this court denied the petition by published decision on the ground that defendant had impliedly consented to a mistrial. (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 294–295 (*Stanley I*).) The California Supreme Court denied review. Proceedings resumed in the trial court on September 28, 2012.

On November 8, 2012, defendant, through counsel, filed a federal habeas petition in the United States District Court for the Central District of California. (See *Stanley v. Baca* (C.D.Cal. June 25, 2013, No. CV 12-9569-JAK (SH)) 2013 U.S. Dist. Lexis 89456.) Defendant claimed he was being prosecuted in violation of the Double Jeopardy Clause because the mistrial was declared without necessity or consent. The district court found abstention proper under *Younger v. Harris* (1971) 401 U.S. 37, 43–54 [91 S.Ct. 746] and dismissed the petition on June 25, 2013. (*Stanley v. Baca*, *supra*, at p. *6.) On July 3, 2013, defendant appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. (See *Stanley v. Baca* (9th Cir. Feb. 19, 2014, No. 13-56172) 555 Fed.Appx. 707 (*Stanley II*).) On July 8, 2013, the Ninth Circuit denied defendant's request to stay his trial, indicating the denial was without prejudice to defendant renewing his request before the state trial court. Trial was not stayed, and jury selection began the next day. Defendant's

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[4] Defendant has not argued that the trial court erred in rejecting his plea of once in jeopardy.

federal appeal was not resolved until after he was tried, convicted, and sentenced in this case.

2. *The second trial*.

Defendant's second jury trial began on July 15, 2013. After an eight-day trial followed by nearly eight hours of deliberations, a jury found defendant guilty of the first degree, premeditated murders of Manuel and Roberto Romero (§ 187, subd. (a); counts 1 and 2), and found true the multiple-murder special circumstance (§ 190.2, subd. (a)(3)) as well as the firearm allegations (§ 12022.53, subd. (b)–(d)). The jury also convicted defendant of possession of a firearm by a felon (former § 12021, subd. (a)(1); count 4)[5] but acquitted him of attempted possession of methamphetamine for sale (§ 664, Health & Saf. Code, § 11378; count 3).

Defendant waived jury trial on the prior-conviction allegations. After a bench trial, the court found the prior strikes true. The court denied defendant's motion for a new trial and his motion to reduce the degree of the crime, and sentenced him to two consecutive terms of life without the possibility of parole plus two consecutive terms of 25 years to life. For count 1 (§ 187, subd. (a)), the court sentenced defendant to life without the possibility of parole based on the special circumstance (§ 190.2, subd. (a)(3)) and the strike priors (§ 1170.12, subds. (a)–(d); § 667, subd. (b)–(i)); the court added 25 years to life for the firearm allegation (§ 12022.53, subd. (d) [personal use and discharge causing death]), to run consecutive, and stayed the remaining

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[5] For purposes of count 4 only, the court found defendant had been convicted of the predicate felony.

firearm allegations under section 12022.5, subdivision (f). The court imposed an identical, consecutive sentence for count 2 (§ 187, subd. (a)). The court stayed count 4 under section 654, and struck the serious-felony prior under section 667, subdivision (a)(2).

Defendant filed a timely notice of appeal on November 19, 2013.

3. *Stanley II and Stanley III*.

On February 19, 2014, after briefing and oral argument, the Ninth Circuit vacated the district court's order dismissing defendant's federal writ petition and remanded for an evidentiary hearing to determine whether he impliedly consented to the discharge of his first jury and the resulting mistrial. (*Stanley II*, *supra*, 555 Fed.Appx. at pp. 708–709.) This appeal was fully briefed on January 8, 2015. On May 13, 2015, we deferred further consideration of the appeal pending resolution of defendant's petition for writ of habeas corpus in *Stanley II*.

On July 24, 2015, the Honorable Gail J. Standish, United States Magistrate Judge, issued a report and recommendation, which the district court adopted on September 15, 2015. (*Stanley v. Baca* (C.D.Cal. 2015) 137 F.Supp.3d 1192 (*Stanley III*).) The district court characterized defendant's pending federal writ petition as a petition for writ of habeas corpus under 28 U.S.C § 2254 and ordered him to address "how he wishes to proceed, including whether he wishes to proceed solely with his existing double jeopardy claim or have this action stayed while he exhausts any additional claims arising from his intervening conviction." (*Stanley III*, at p. 1193.) On October 15, 2015, defendant asked the district court to stay his federal case until his state appeal is resolved. The district court granted his

request, and on December 4, 2015, we resumed consideration of this appeal.

FACTS

In May 2008, defendant was living in Las Vegas with his wife, Tracey. He owned a barbershop, and wore his hair in dreadlocks, with the sides of his head shaved—a style described at trial as a dreadlock mohawk. Although he lived in Las Vegas, defendant grew up in Los Angeles—on West 74th Street between Figueroa and Flower—and still had family in the area. Defendant's customers called him by his childhood nickname, JoJo.

Defendant's mobile phone number was (702) 352-5550. The phone was used on May 3, 2008, in North Las Vegas, Nevada. Late that night, defendant traveled from North Las Vegas to Los Angeles. By 3:17 a.m. on May 4, 2008, defendant had reached South Los Angeles. On May 4, 2008, defendant spent the day in the city.

Manuel Romero lived in a van, which he parked in front of his family's house at 528 West 74th Street, between Hoover and Figueroa in Los Angeles. Manuel and his brother Roberto had a nephew named Jorge Duke. Manuel raised Duke, and Duke thought of Manuel as his father. Kathi Preston also lived on West 74th Street, west of Figueroa. Her mother, Jean Preston,[6] and her son, Devondre Haynes, lived with her.

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[6] Because Kathi and Jean Preston share a last name, we refer to them by their first names.

1. *May 4, 2008*.

Around 5:00 p.m. on May 4, 2008, defendant arrived at Kathi's house in an SUV. He wore his hair in blonde and black dreadlocks with the sides of his head shaved and was accompanied by an African-American woman. Defendant was looking for Tymore Haynes—defendant knew him as T-Mo—a childhood friend who used to live there. T-Mo was Devondre Haynes's father; he died in 1991. Defendant had grown up down the street from T-Mo—and from Kathi. Haynes, however, had never met him. Kathi and Haynes visited with defendant for about an hour.

Around 6:00 p.m., defendant and Haynes left Kathi's house together, crossed the street, and walked toward the nearby Romero home. Haynes was in his early 30's and wearing a blue sweater. Defendant was wearing a white t-shirt and a big, gold chain. A group of people, including Duke and Manuel, was hanging out next to Manuel's van; defendant and Haynes joined them. Roberto arrived sometime after dark, and by 8:30 p.m., Roberto Carlos Bustos (Bustos) had parked his car behind the van. Bustos reclined his front seat and remained in the car, resting. Everyone was smoking marijuana and drinking malt liquor and beer. Defendant and Haynes ultimately stayed for three or four hours.[7]

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[7] The introductory paragraph of the dissent characterizes Haynes as an "in-custody murder-suspect." (Dis. opn., *post*, at p. 1.) In fact, Haynes was a percipient witness to the shooting, and although Haynes did not have a preexisting relationship with defendant, the record reflects that they spent several hours

Defendant told Manuel and Duke that he used to live on the block but had moved to Las Vegas. To Duke, it sounded like defendant was speaking with a Jamaican or Belizean accent, using phrases like "me likie" and "I love Cali people." According to Haynes, defendant asked Manuel about "buying some dope." Though Duke recalled Haynes speaking to Manuel, he did not know who asked Manuel about drugs. Manuel started making phone calls. Duke also heard defendant tell Manuel's friend Paisan that "he triples it out there[,]" and "gets a good profit." Someone else in the group mentioned weapons. Duke looked around and saw a bulky shape on defendant's waistband. Earlier in the day, Haynes had noticed a black handgun tucked in defendant's waistband.[8]

Defendant's female companion returned in the SUV and parked across the street. Defendant left the party with the woman; they walked down West 74th Street together to look at defendant's old house, which was four or five houses away. At 8:02 p.m., defendant's mobile phone was used to call Manuel's phone. The call was made within a mile of Manuel's van.

While defendant showed the woman his old neighborhood, Haynes waited by the van with Manuel, smoking marijuana and drinking beer. At some point, Haynes's brother Rodney Kirk

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together before the shooting. The trier of fact reasonably could credit Haynes's identification of defendant as the shooter.

[8] Haynes's preliminary hearing testimony was inconsistent on this point. At the preliminary hearing, Haynes testified he did not see a gun but was told defendant had one.

joined them. The conversation made Duke uncomfortable, and he left.

As Duke was leaving, the couple returned. The woman got back inside the SUV, and defendant returned to the group next to the van. Manuel and Roberto walked down a nearby alley. They returned 15 minutes later. Manuel went to the van; Roberto stood in the street. Manuel emerged from the van's rear passenger door, followed a few minutes later by defendant. Defendant looked directly at Bustos, who was still reclining in his car. Haynes was standing on the grass adjacent to the curb; Manuel and defendant stood between Haynes and the van.

2. *The shooting and aftermath*.

Around 8:45 p.m., Haynes saw a muzzle flash and heard a shot. Bustos saw defendant raise his arm, saw muzzle flashes, and saw Manuel fall. Meanwhile, Roberto was still standing in the nearby street. Bustos saw defendant walk to the front of the van, then heard more gunshots. As defendant walked past Bustos, he fired one more time. Haynes and Kirk ran away. Bustos saw defendant enter a nearby SUV; the SUV drove off "really fast[.]"

Police responded to the Romero home moments later. A Chevrolet Suburban or Tahoe was pulling away as they approached. Police found Manuel lying on the grass near his van. He was dead—killed by a gunshot wound to the head. Roberto was lying on the ground between two parked cars. He was alive, but died en route to the hospital from multiple gunshot wounds. An hour later, defendant was still in the neighborhood; he began the drive back to Las Vegas around 10:00 p.m. and arrived home by the next morning.

At the scene, police found five used nine-millimeter shell casings and one live nine-millimeter round. A search of Manuel's pockets revealed $219 cash, a mobile phone, and a slip of paper with the phone number (702) 352-5550 and the name JoJo. A search of the van revealed a small bag of white powder; the powder was not a controlled substance. The police collected fingerprints from the van and surrounding items; none of the fingerprints matched defendant's. Though the shell casings and live round were not tested for fingerprints, police did swab them for DNA. However, the lab was unable to extract a DNA profile. The record does not reveal whether police collected or analyzed additional DNA or other physical evidence.

3. *The investigation.*

On October 17, 2008, Haynes was taken into custody for the unrelated murder of Kevin Baldwin. Haynes thought—and at trial, appeared to still think—he was a suspect not only in the Baldwin murder, but also in the murders of Manuel and Roberto. During his interrogation, Haynes was shown a six-pack photographic lineup; he identified someone other than defendant as looking like the shooter. When the interview was over, police arrested him for the murder of Kevin Baldwin.

The police interrogated Haynes again four days later, and this time, Haynes identified defendant as the shooter.[9] Haynes

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[9] As discussed in the body of the opinion, though police showed Haynes the same six-pack array the court ruled unduly influenced two other witness identifications, the court denied the defense motion to exclude Haynes's identification. Although there were lengthy proceedings on this issue before the first trial, the record on appeal did not contain any motions or transcripts of

believed the police wanted him to identify someone in the Romero killings, and thought that if he failed to do so, he might be prosecuted for those murders too. As they began questioning him, the police told Haynes, "So whether this guy represented himself one way or whatever it might be, we just need to know everything—because it comes out later and then you don't come up front with it and you're telling me that's all the truth then later it looks bad for you because then it looks like you were hiding something." Haynes then described the events of May 4, 2008. He explained that the reason he did not identify defendant during their earlier interview was that he feared for his own safety and his family's safety.[10] Police released Haynes from custody that day. He was not prosecuted in either case.

A week later, on October 28, 2008, defendant was arrested in Las Vegas. At the time of his arrest, defendant wore his hair in dreadlocks, with the sides of his head shaved. He did not

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proceedings that occurred before November 7, 2011, and appellate counsel did not move to correct or augment the record to include them. In light of the seriousness of this case and the importance of this portion of the record, we augmented the record on our own motion.

[10] On direct examination, Haynes testified that he was still afraid for the safety of his grandmother, Jean, who continued to live in the house. Then, on cross-examination, he explained, as he did at the preliminary hearing, that he had identified defendant as the shooter because he feared retaliation from the real culprit, not defendant. But on redirect, Haynes testified again that defendant was the shooter.

speak with an accent, and did not have any tattoos. A search of his house did not uncover any evidence of drug sales.

4. *Defense evidence.*

The defense acknowledged defendant was in Los Angeles on the day of the murders, but argued it was for an innocent purpose—defendant came to the city to see his family and his old neighborhood, spent some time there, then went home. The phone records and most of the testimony were consistent with that theory. As for the eyewitness testimony, the defense argued Bustos's identification was more consistent with testimony by Carlos Ramos Montoya, who also witnessed the shooting, than it was with the contradictory and confusing version presented by Haynes. Since Haynes was a liar trying to save his own skin, the jury should disregard Haynes's identification.

Montoya testified that on the evening of May 4, 2008, he drove to his sister's house on West 74th Street. Before Montoya got out of his car, his friend Manuel called out to him. As Montoya walked toward his sister's house, he saw Manuel speaking with two African-American men in a parked SUV. The driver had long braids covering his head and the passenger was nearly bald. Manuel turned away from the men and began walking back to his van.

The men got out of the SUV and followed Manuel. They were angry and aggressive, used vulgar language, and carried at least one gun. The men walked past Montoya. He noted their size, shoes, clothing, and hair. The man with braids was wearing a white and blue sleeveless shirt and denim shorts; he was not wearing a necklace or a chain. He had a tattoo on his left shoulder, which Montoya attempted to describe to detectives. The defense emphasized that Montoya's testimony was consistent

with the description Bustos gave the police: the shooter had long braids covering his head and was wearing a sleeveless shirt.

The defense expert, Dr. Kathy Pezdek, testified about factors that reduce the accuracy of eyewitness identifications. These include lighting and distance; length of exposure to a suspect; weapon focus; cross-racial identification; disguise; memory details; the passage of time between the event and the identification; lineup procedures—including biased lineups, double-blind procedures, and admonition comprehension; and bias of in-court identifications. Finally, Dr. Pezdek pointed to the "large number of studies" concluding the certainty of an eyewitness identification does not correlate with its accuracy.

Finally, the defense called Devondre Haynes. Haynes admitted drugs were sold out of his house. In 2003, he was convicted of felony drug sales. In contrast to Haynes, the defense argued, the police had uncovered no evidence connecting defendant to the drug business.

CONTENTIONS

Defendant contends double jeopardy barred retrial in this case and asks us to reconsider our opinion in *Stanley I*.[11] He also

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[11] In the appellant's opening brief, defendant *acknowledges* that his contention that retrial was barred by double jeopardy was rejected by this court in *Stanley I* "and is now the law of the case." However, he requests that in light of the Ninth Circuit's decision in *Stanley II*, this court reconsider its previous decision in *Stanley I* that there was implied consent to a mistrial. The opening brief also indicates that defendant is required to raise the double jeopardy claim at this juncture in order to petition for review of the issue.

contends his convictions are not supported by substantial evidence.

DISCUSSION

1. *This court's prior decision in* Stanley I*, which is law of the case, established that retrial was not barred by double jeopardy.*

a. *Double jeopardy.*

The double jeopardy clauses of the federal and state constitutions bar retrial of a criminal defendant following his acquittal. (*People v. Batts* (2003) 30 Cal.4th 660, 679-680 (*Batts*); *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712 (*Curry*).) It is long established that once jeopardy has attached, discharge of the jury without a verdict is tantamount to an acquittal and prevents a retrial unless the defendant consented to the discharge or legal necessity required it. (*Id.* at p. 712.) Legal necessity exists, for example, "where physical causes beyond the control of the court such as the death, illness or absence of a judge, juror or the defendant make it impossible to continue. [Citation.] Legal necessity has also been found where it becomes necessary to replace defense counsel during trial due to the disappearance of counsel at a critical stage of trial." (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175.)

A defendant may also consent to a mistrial, either expressly or impliedly, and thereby waive any later double jeopardy claim. (*Batts*, *supra*, 30 Cal.4th at pp. 679-682.) Implied consent may be found where a defendant's "affirmative conduct . . . clearly evidences consent" to a mistrial. (*Curry*, *supra*, 2 Cal.3d at p. 713.) For example, consent may be implied when "the defendant actually initiates or joins in a motion for mistrial [citation]." (*Ibid.*) But consent will not be inferred from

silence, failure to object to a proposed order of mistrial, or simply bringing a matter to the court's attention. (*Ibid.*; *People v. Compton* (1971) 6 Cal.3d 55, 62–63.)

b. Stanley I *established the law of the case, so as to defeat defendant's contention that his retrial was barred.*

Defendant contends the court in this case erred in denying his motion to dismiss for a double jeopardy violation because the court dismissed his first jury without legal necessity or consent and his convictions were therefore obtained in violation of the Double Jeopardy Clause.[12] Defendant's attempt to avoid *Stanley I* is unavailing.

(1) Stanley I *determined that defense counsel impliedly consented to the mistrial.*

In *Stanley I*, this court addressed defendant's double jeopardy claim and concluded that defense counsel impliedly consented to a mistrial. (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 287-289.)[13] *Stanley I* acknowledged the rule of *Curry*, *supra*,

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[12] As for the trial court's refusal to accept defendant's proffered plea of once in jeopardy, as indicated, defendant has not argued that the trial court erred in rejecting his plea. Instead, defendant raised his claim of double jeopardy below by way of a pretrial motion to dismiss, which is an appropriate method of asserting that the accusatory pleading is allegedly barred by double jeopardy. (*Batts*, *supra*, 30 Cal.4th at p. 676.) Defendant then sought a writ of prohibition in *Stanley I*, challenging the trial court's denial of his motion to dismiss.

[13] We disagree with the dissent's discussion and analysis of the events leading up to the dismissal of the first jury. For example, with respect to Juror 4, who asked to be excused in order to stay at home with his fiancée who had just broken her

2 Cal.3d at page 713, that consent to a mistrial may not be implied from *mere silence*, but following a lengthy discussion of case law as applied to its fact situation, concluded this was not a case of defense counsel's " 'mere silence.' " (*Stanley I*, *supra*, at pp. 281, 288.) *Stanley I* reasoned, "[w]hile it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial," defense counsel "previously fully participated in the discussion and led

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ankle, the dissent states "there are disputed factual issues *as to whether the court intended to excuse* [Juror 4] and whether defense counsel wanted to keep him." (Dis. opn., *post*, at pp. 7-8, italics added.) The dissent's reading of the record is at odds with *Stanley I*, which stated "it appears that the trial court intended to excuse the juror [Juror 4]." (*Stanley I*, *supra*, 206 Cal.App.4th at p. 271.) The dissent simply seeks to substitute its understanding of the record for *Stanley I*'s interpretation.

Similarly, with respect to whether Juror 4 could have served, the dissent states he did not "volunteer a solution" when the trial court asked for an alternative that would enable him to serve. (Dis. opn., *post*, at p. 7.) In this regard, *Stanley I* actually stated: "When the trial court had sought alternatives to dismissing [Juror 4], defense counsel had requested only that the juror be asked if there was any alternative to him being the sole caretaker. The question was posed to the juror *and he had responded that there was not*." (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 271-272, italics added.) Although it was shown in *Stanley I* that Juror 4 had no feasible alternative to serving as his fiancee's caretaker, the dissent invites speculation that some alternative existed that might have enabled Juror 4 to serve. The law of the case doctrine does not permit us to reweigh the evidence in this regard.

the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court." (*Id.* at p. 288.) *Stanley I* construed this participation as affirmative conduct sufficient to support the trial court's finding that defendant impliedly consented to the mistrial. (*Id.* at pp. 287-289.)

(2) *The doctrine of law of the case*.

Under the law of the case doctrine, when an appellate court " ' "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." ' " (*People v. Stanley* (1995) 10 Cal.4th 764, 786 (*Stanley*); see, e.g. *People v. Jurado* (2006) 38 Cal.4th 72, 94-97 [double jeopardy claim barred by law of the case doctrine; *People v. Sons* (2008) 164 Cal.App.4th 90, 98-99 [same].)

It is "clear that the law of the case doctrine can apply to pretrial writ proceedings. When the appellate court issues an alternative writ [or an order to show cause], the matter is fully briefed, there is an opportunity for oral argument, and the cause is decided by a written opinion. The resultant holding establishes law of the case upon a later appeal from the final judgment. [Citations.]" (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894 (*Kowis*).)

If the rule were otherwise, a petitioner who was unsuccessful in the pretrial writ proceeding would be afforded a second bite of the apple, at the time of the subsequent appeal from the final judgment—the appellate court's decision on the alternative writ or order to show cause would be relegated to the status of a tentative opinion, subject to de novo review on the

appeal from the judgment. Therefore, the law of the case doctrine requires that an appellate decision in a writ proceeding, following plenary briefing, the opportunity for oral argument, and a written opinion, is entitled to finality and must be adhered to as the case progresses.

"The principal reason for the [law of the case] doctrine is judicial economy. 'Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding.' [Citation.] Because the rule is merely one of procedure and does not go to the jurisdiction of the court [citations], the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice' ([*People v.*] *Shuey* [(1975)] 13 Cal.3d [835,] 846 [disapproved on other grounds as stated in *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn. 4.]), or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation]." (*Stanley*, *supra*, 10 Cal.4th at pp. 786–787.)

A mistaken ruling is not enough to avoid the doctrine: "Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important." (*Tally v. Ganahl* (1907) 151 Cal. 418, 421, quoted with approval in *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 459.) Therefore, irrespective of whether *Stanley I* misapplied *Curry* and its progeny, or whether the current panel would have reached a different conclusion on the facts presented, if the law of the case doctrine "is to be other than an empty formalism more

must be shown than that a court on a subsequent appeal disagrees with a prior appellate determination. Otherwise the doctrine would lose all vitality and . . . would be reduced to a vapid academic exercise." (*Shuey*, *supra*, 13 Cal.3d at p. 846.)

(3) *No issue as to retroactivity;* Stanley I *implicitly but necessarily decided that its holding applies to this defendant*.

Defendant contends *Stanley I* announced a new rule of law which should not be retroactively applied to him. The argument is unpersuasive.

The doctrine of law of the case is applicable not only to questions expressly decided but also to questions *implicitly* decided because they were essential to the decision on the prior appeal. (*Olson v. Cory* (1983) 35 Cal.3d 390, 399 (*Olson*).)[14]

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14 The dissent rejects the Supreme Court's language in *Olson* that the doctrine of law of the case extends to questions "*implicitly* decided because they were essential to the decision on the prior appeal" (35 Cal.3d at p. 399, italics added) as mere dictum. Instead of following *Olson*, the dissent takes the position that the Supreme Court's later decision in *Kowis* established that the law-of-the-case doctrine "does not apply to issues that could have been raised, but were not. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.)" (Dis. opn., *post*, at p. 15.) However, *Kowis* does not support the point for which it is cited by the dissent, and *Kowis* did not overrule or supersede *Olson*. Our reading of *Kowis* is that it stands for the proposition that the summary denial of a writ petition, without issuance of an alternative writ and the opportunity for oral argument, does not establish law of the case. (*Kowis*, *supra*, 3 Cal.4th at pp. 892-901.)

Although *Stanley I* did not expressly address the issue of retroactivity, *Stanley I* implicitly decided the retroactivity issue in the People's favor when it denied defendant's request for a writ of prohibition. The question of retroactivity was essential to the decision on the prior appeal, because if *Stanley I* did announce a new rule which was to apply purely prospectively, *Stanley I* would have granted defendant's request for a writ of prohibition.

Thus, we conclude *Stanley I* implicitly but necessarily resolved the retroactivity question in the People's favor.[15] [16]

As for the dissent's dismissal of the relevant language in *Olson* as mere dictum, we are mindful that "our Supreme Court's decisions bind us, and [even] its dicta command our serious respect." (*Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66.) We are also not persuaded by the dissent's theory that case law *prior to* the 1983 *Olson* decision impliedly undermined *Olson*, and by the dissent's assertion that "*Olson* is bad law." (Dis. opn., *post*, at p. 18.) The dissent does not cite any post-*Olson* decision from the past 33 years calling into question *Olson*'s soundness. As an intermediate appellate court, we are bound by *Olson*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction"].)

[15] We reject the dissent's suggestion that the People have conceded *Stanley I* is not law of the case with respect to the issue of retroactivity. The People have argued there was no need for a retroactivity analysis in *Stanley I* because that decision did not make any new law. We agree that *Stanley I* simply applied existing law to a given fact situation. Further, *Stanley I* implicitly decided there was no issue as to retroactivity, by denying the petition for a writ of prohibition and thereby applying its legal determination to defendant's case.

(4) *No basis here for avoidance of law of the case; no manifest injustice in applying the holding in* Stanley I *to this defendant.*

The previous panel, in *Stanley I*, was presented with the same facts pertaining to the issue of double jeopardy. *Stanley I* found defense counsel's affirmative conduct amounted to implied consent. *Stanley I* reasoned that "despite defendant's argument to the contrary, we conclude that the instant case is not controlled by *Curry*. This is not a case of 'mere silence,' and certainly not a case of silence following a statement indicating a lack of consent to a mistrial. While it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial, he had previously fully participated in the discussion and led the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court. Thus, the issue presented by this case is one of whether defense counsel's affirmative conduct was sufficient to give rise to an implication of consent. We conclude that it was." (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 287-288.)

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16 Because *Stanley I* implicitly determined its holding would apply to defendant, and *Stanley I*'s resolution of that issue is law of the case, it is unnecessary to address the dissent's extensive analysis as to why *Stanley I* should not be applied retroactively. Therefore, we do not respond, inter alia, to the dissent's arguments that the equities favor prospective application of *Stanley I*, that learned treatises did not place counsel on notice of the rule announced in *Stanley I*, and that ethics requirements did not place counsel on notice of the rule announced in *Stanley I*.

Even assuming *Stanley I* misread *Curry* by holding that defense counsel's affirmative conduct constituted implied consent, *Stanley I* contained an extensive discussion of *Curry* and the case law on which *Curry* relied, to wit, *Mitchell v. Superior Court* (1962) 207 Cal.App.2d 643, *Hutson v. Superior Court* (1962) 203 Cal.App.2d 687, and *People v. Valenti* (1957) 49 Cal.2d 199.) (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 281-287.) *Stanley I* then went on to conclude that *Curry* should not apply when conduct preceding defense counsel's silence leads the court to reasonably believe that defendant consents to the mistrial. (*Stanley I*, at pp. 287-289.) At this juncture, defendant "simply seeks to have a subsequent appellate panel disagree with the first appellate panel." (*People v. Sons*, *supra*, 164 Cal.App.4th at p. 99.) However, as indicated, mere disagreement with the earlier decision in *Stanley I* is not a basis for departing from law of the case. (*Morohoshi v. Pacific Home*, *supra*, 34 Cal.4th at p. 491.)[17]

Defendant also argues that the Ninth Circuit's opinion in *Stanley II* "altered or clarified" "the controlling rules of law" such

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[17] Although the denial of a petition for review is not regarded as expressing approval of the Court of Appeal's opinion (*DiGenova v. State Bd. of Ed.* (1962) 57 Cal.2d 167, 178), the denial of review is not "without significance" (*ibid.*), and we observe that the California Supreme Court denied a petition for review in *Stanley I*. (See *People v. Sons*, *supra*, 164 Cal.App.4th at p. 98 [noting that California Supreme Court denied petition for review of prior published Court of Appeal opinion (*Sons v. Superior Court* (2004) 125 Cal.App.4th 110) which rejected appellant's double jeopardy claim, denied a petition for writ of prohibition, and was law of the case].)

that we must disregard the law of the case. (*Stanley*, *supra*, 10 Cal.4th at p. 787.) We disagree. As a preliminary matter, decisions of intermediate level federal courts are not binding on us. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 882.) Moreover, *Stanley II* did not change the legal landscape with respect to double jeopardy; in *Stanley II*, the Ninth Circuit simply found that "[o]n the present record, we are unable to determine whether mistrial was supported by implied consent" (*Stanley II*, *supra*, 555 Fed.Appx. at p. 708), and it remanded to the district court for a hearing to determine whether mistrial was supported by implied consent. (*Id.* at p. 709.)

Finally, we reject the contention that applying *Stanley I* as law of the case will result in " 'an unjust decision.' " (*People v. Shuey*, *supra*, 13 Cal.3d at p. 842.) "As the United States Supreme Court stated in a somewhat different context, 'There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. . . . .' (*Ohio v. Johnson* (1984) 467 U.S. 493, 502 [104 S.Ct. 2536].) Clearly, there was no government overreaching by the prosecutor in this case; [the mistrial was] just an attempt by the trial court to conserve judicial resources when it became reasonably apparent that the impaneled jury had lost so many members as to make it unlikely that sufficient jurors would remain to render a verdict in what promised to be a lengthy trial." (*Stanley I*, *supra*, 206 Cal.App.4th at p. 290, fn. omitted.)

We are guided by the recognition that "[a]t its core, the double jeopardy clause 'protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' (*Green v. United States* (1957) 355 U.S. 184, 187 [78 S.Ct. 221].) The policy underlying the

double jeopardy protection 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.' (*Id.* at p. 187.)" (*People v. Eroshevich* (2014) 60 Cal.4th 583, 588.) The fundamental principle is "that '[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' [Citation.] This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. [Citations.]" (*Tibbs v. Florida* (1982) 457 U.S. 31, 41–42 [102 S.Ct. 2211].) None of these things happened in the case at bar.

In short, as *Stanley I* observed, there was no governmental overreaching by the prosecutor; "the prosecution had only the opportunity to impanel a jury." (*Stanley I*, *supra*, 206 Cal.App.4th at p. 290, fn. 34.) Under these circumstances, we do not perceive a manifest injustice in adhering to *Stanley I* as law of the case.[18]

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[18] The dissent asserts it is manifestly unjust to apply *Stanley I* as law of the case because defendant was entitled to a jury trial on disputed factual issues underlying his plea of once in jeopardy. However, defendant has not contended on appeal that the trial court erred in refusing to entertain his plea of once in jeopardy, that issue has not been briefed, and is simply not before us. (See

For these reasons, we reject defendant's argument that retrial was barred by double jeopardy.

2. *No merit to defendant's challenge to sufficiency of the evidence.*

Defendant contends, given the weakness of the eyewitness identifications, the lack of physical evidence, and the jury's apparent rejection of the prosecution's theory of the case, there is insufficient evidence to support his convictions.

Our review is governed by settled principles. In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies where the conviction rests

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fn. 12, *ante*.) That argument not having been made by defendant, it is inappropriate for this court to now take the position that *Stanley I* is manifestly unjust because it denied defendant a jury trial on disputed factual issues. Our reading of defendant's appellate arguments herein is that this court in *Stanley I* erred in finding there was implied consent to a mistrial. We have already addressed that issue.

primarily on circumstantial evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) We may not reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Except for accomplice testimony, which must be corroborated, the testimony of a single witness can be sufficient to uphold a conviction—even when there is significant countervailing evidence, or the testimony is subject to justifiable suspicion. (*Zamudio*, *supra*, 43 Cal.4th at p. 357; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Accordingly, we may not reverse for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

a. *Eyewitness testimony*.

Defendant emphasizes that no physical evidence connected him to the shootings, and he argues the jury had good reason to regard the eyewitness testimony with suspicion. Defendant suggests the eyewitness testimony in this case was particularly unworthy of belief because of the nature of the crime, the different races of the shooter and some witnesses, the importance of the eyewitness evidence to the case, and improper police tactics used to elicit some identifications.[19]

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[19] "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . . Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for

In this case, the trial court suppressed the testimony of two eyewitnesses because the investigating detectives used unduly suggestive procedures to obtain the identifications.[20] Although two additional eyewitnesses, Jorge Duke and Devondre Haynes, identified defendant from the same six-pack used by the excluded witnesses, the trial court allowed the prosecution to present their identification testimony over defense objection.

Defendant also raises a concern with respect to the testimony of Bustos—the only witness other than Haynes to identify defendant as the shooter. Immediately after the shooting, Bustos identified two people as the possible shooter—a civilian bystander and a photograph of a dead gang member on the police station wall. Then, eleven days after the shooting, Bustos was shown the suggestive six-pack.[21] Bustos took his time and looked carefully at the pictures. He told the detective that while another man looked the most like the shooter, the shooter was not in the lineup. Montoya and Bustos both

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observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*United States v. Wade* (1967) 388 U.S. 218, 228–229, fn. omitted.)

[20] Among other issues, detectives presented witnesses with a six-pack photographic lineup in which defendant was the only person with braids and his photograph was a different color than the other photos.

[21] The police used the same six-pack for every witness. The court denied the defense motion to exclude the identifications by Duke and Haynes, but it does not appear the defense moved to exclude the Bustos identification.

described a man with a tattoo, a white tank top, and tight braids around his entire head. Bustos told the detective that the hair in the photos did not match—defendant had a dreadlock mohawk, not tight braids—but the detective asked Bustos to look again and focus on their faces. Bustos looked again. Again, Bustos told the detective the shooter was not in the lineup. This time, the detective asked Bustos to focus on a series of facial features. Bustos looked again. Again, Bustos told the detective the shooter was not in the lineup. Bustos could not remember whether the detective next suggested the lighting in the photos might be different—but he did remember that, 11 days after the shooting, the shooter's photograph was not in the six-pack. Bustos testified he did not pick defendant out of the lineup because the shooter "wasn't there. It wasn't him. I said that one of them looked a little bit like him, but he was not there."

A year and a half later, at the preliminary hearing, Bustos identified defendant for the first time. He indicated the shooter was wearing blue and was sitting "with the attorney or, you know, the other white male." At the time, defendant was wearing a blue prison jumpsuit, was handcuffed to a chair, and was the only African-American man in the room. Bustos also identified defendant at trial.[22] The defense expert explained the problem with identifications like these: "If, in fact, there is only one

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[22] We note the prosecutor apparently stood behind defendant during in-court identifications by at least one witness. The record does not reveal whether she used this technique during every in-court identification, and it does not appear that defense counsel objected.

person at counsel table who even remotely matches the description that [the witness] gave a year or more [after the crime], it renders that identification invalid. It's not a real test of whether they recognize what the perpetrator looked like. [¶] Also, the courtroom situation is a biased context, in that eyewitnesses often assume that by the time they have someone in court, they have other compelling evidence against that person, and [the witness's] job is to then identify that person . . . . So it's a biased context for making an identification, as opposed to a fair and unbiased photographic lineup administered closer in time to the situation."

However, a positive in-court identification following an earlier failure to identify need not necessarily be excluded. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197.) Further, Bustos previously had seen defendant in the area at least once, and Bustos testified it was easier for him to recognize defendant in court than in a photograph. Moreover, in the end, the jury was well apprised of all these problems. During the trial, defense counsel extensively and skillfully cross-examined eyewitnesses concerning the accuracy and reliability of their memories; a defense expert testified about the pitfalls of eyewitness identifications; the court gave the jury a thorough instruction explaining how to evaluate this type of evidence (CALCRIM No. 315); and in closing argument, defense counsel argued at length about the weaknesses of eyewitness identification, including the specific problems of cross-racial identification and the effects of stress on memory and of information received after the event.

The jury was provided with all the information it needed to evaluate the reliability and credibility of these witnesses—and

the record reveals that the jury took its responsibility seriously. The jurors requested read-back of the eyewitness testimony; after a one-week trial, they deliberated for nearly eight hours over three days; and they acquitted on count 3. We may not reweigh the evidence or reevaluate the witnesses' credibility. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Despite the concerns relating to Bustos's testimony, the jury believed him; under these circumstances—and in light of Haynes's testimony and the corroborating evidence—we cannot second-guess the jury's determination.

b. *We may consider the corroborating evidence notwithstanding the jury's verdict on count 3.*

Defendant argues the eyewitness testimony was particularly problematic because the jury acquitted him of attempted possession of methamphetamine for sale, and we must therefore reject the prosecution's motive theory – that the shooting was in retaliation for an attempt to sell him baking soda in lieu of drugs – and must also disregard the evidence supporting it; once we discard that evidence, he argues, only the eyewitness testimony remains.

With respect to the drug evidence, we note at the outset that the prosecution is not generally required to prove motive. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503-504 [motive describes the reason a person chooses to commit a crime and is usually not an element of the offense]; see CALCRIM No. 370 [same].) In any event, in light of the evidence that Manuel's van contained only a single baggy that did not contain a controlled substance, the count 3 verdict does not necessarily imply the jury rejected the prosecution's theory of the case. The jury may have decided defendant's plan to purchase methamphetamine for sale

did not progress beyond the planning stage, and thus there was no direct, unequivocal act. (§ 21a [attempt requires specific intent to commit the target crime and a direct, ineffectual act done towards its commission]; *People v. Johnson* (2013) 57 Cal.4th 250, 258 [to avoid punishing nothing more than guilty mental state, there must be act toward completion of crime before attempt will be recognized]; see CALCRIM No. 460.) Alternatively, given that the item defendant attempted to possess was not actually methamphetamine, the jury may have believed defendant attempted to do something that was not actually a crime. (See, e.g., *People v. Siu* (1954) 126 Cal.App.2d 41, 43 ["Defendant also argues that his case is similar to the old law-school classics that there can be no corpus delicti when a husband fires a gun at a dummy in a bed, thinking it the paramour of his wife, or when an attempt is made to poison with an innocuous substance, or when a person points an unloaded gun at another"].) Since Manuel was making phone calls about cocaine, not methamphetamine, the jury could have concluded defendant attempted to buy cocaine. Or, as the People suggest, because the evidence of specific intent to sell was sparse, the jury may have believed defendant attempted to possess methamphetamine for personal use.[23]

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[23] Defendant cites two cases in support of his position that we should disregard all drug-related evidence—*Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337 (*Mitchell*) and *People v. Medina* (1995) 39 Cal.App.4th 643 (*Medina*). *Mitchell* is not binding on this court and regardless, has not been good law since the Ninth Circuit overruled it in 1998. (*Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242.) In *Medina*, the jury was presented with

Viewed in the light most favorable to the prosecution, there was sufficient evidence to support the jury's verdicts. Kathi, Bustos, Haynes, and Duke placed defendant at or near the scene of the shooting on the evening of May 4, 2008. Defendant's mobile phone also placed him in the area. Haynes saw defendant with a gun and Duke saw him with an item shaped like one. Bustos and Haynes identified defendant as the shooter. They provided consistent details of how the murders occurred, from vantage points that were mere feet away. After the shooting, someone using defendant's mobile phone made multiple calls—including a call to Haynes's home—while travelling from the vicinity of the shooting in Los Angeles to Las Vegas, where defendant lived; although defendant remained in the area until an hour after the shooting, the jury could reasonably have viewed the timing of this drive as evidence of flight and consciousness of guilt. Notwithstanding defendant's arguments to the contrary, taken together, this testimony was sufficient to convince a rational trier of fact, beyond a reasonable doubt, that defendant committed the offenses of which he was convicted.[24]

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two inconsistent versions of events. Because the verdicts indicated the jurors believed the codefendant, not the victim, the court analyzed the sufficiency of the evidence using the only facts supporting the codefendant's version. (*Medina*, at pp. 646–647, 651–652.) In this case, because the jury was not presented with two incompatible versions of events, its conclusion that the People did not prove count 3 beyond a reasonable doubt does not mean they rejected the evidence entirely or found it unworthy of belief.

[24] The dissent, in a footnote and without elaboration, asserts there are "real concerns about actual innocence in this case."

3. *Erroneous fees and penalty assessments*.[25]

"In passing sentence, the court has a duty to determine and impose the punishment prescribed by law." (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589.) An unauthorized sentence may be challenged "for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) Based on our review of the record, it appears the trial court made three errors when imposing the fines and assessments below.

First, the court imposed and suspended a $300 parole revocation fine under section 1202.45. Normally, the court is required to impose and stay a probation or parole revocation fine equal to the restitution fine. But the court in this case sentenced defendant to life in prison *without* the possibility of parole. Since, notwithstanding its indeterminate portion, the sentence does not include a period of parole, section 1202.45 is inapplicable. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1181–1186.) The fine should not have been imposed, and we reverse it. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 637.)

Second, the sentencing court must impose one $40 court security fee (§ 1465.8) and one $30 court facilities assessment

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(Dis. opn., *post*, at p. 1, fn. 1.) The dissent's assertion is undeveloped and therefore we do not address it.

[25] In the interest of judicial economy, we correct these errors without first requesting supplemental briefing. Any party wishing to address these issues may petition for rehearing. (Gov. Code, § 68081.)

(Gov. Code, § 70373) on every criminal conviction, including any conviction stayed under section 654. (*People v. Woods* (2010) 191 Cal.App.4th 269, 273–274; *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1112 ["imposition of an assessment under Government Code section 70373(a)(1) is required"].) Here, defendant was convicted of three felonies—two counts of first-degree murder (§ 187, subd. (a); counts 1 and 2) and one count of possession of a firearm by a felon (former § 12021, subd. (a)(1); count 4). The court properly imposed three $40 court security fees (§ 1465.8), for a total of $120. However, the court erred by imposing four $30 court facilities assessments (Gov. Code, § 70373) totaling $120 rather than three assessments totaling $90. Because one of the four assessments is erroneous, we modify the judgment to impose only three $30 court facilities assessments totaling $90.

Third, the court improperly imposed $324 in penalty assessments on these two fees—namely, a $120 state penalty assessment under section 1464, a $24 state criminal surcharge under section 1465.7, a $60 DNA assessment under Government Code section 76104.6, a $60 DNA assessment under Government Code section 76104.7, and a $60 court construction assessment under Government Code section 70372.

The state penalty assessment is levied "upon every fine, penalty, or forfeiture imposed by the courts for all criminal offenses . . . . " (§ 1464, subd. (a).) The state surcharge is "levied on the base fine used to calculate the state penalty assessment . . . . " (§ 1465.7, subd. (a).) The two DNA assessments and the court construction assessment appear in Chapter 12 of Title 8 of the Government Code, and are levied on the same base fine as the state penalty assessment and the state

surcharge. However, as the statutes themselves state, neither the court facilities assessment (Gov. Code, § 70373) nor the court security fee (§ 1465.8) are part of that base fine—and both are exempt from the additional penalty assessments imposed by the trial court. (Gov. Code, § 70373, subd. (a)(2) ["This assessment . . . *may not be included in the base fine* to calculate the state penalty assessment as specified in subdivision (a) of Section 1464 of the Penal Code. The *penalties authorized by Chapter 12* (commencing with Section 76000) [of Title 8 of the Government Code], *and the state surcharge authorized by Section 1465.7* of the Penal Code, *do not apply to this assessment*." (Italics added)]; § 1465.8, subd. (b) ["This assessment . . . may not be included in the base fine to calculate the state penalty assessment as specified in subdivision (a) of Section 1464. *The penalties authorized by Chapter 12* (commencing with Section 76000) of Title 8 of the Government Code, *and the state surcharge authorized by Section 1465.7, do not apply to this assessment*." (Italics added)]; *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1394–1396 [may not impose DNA penalty on court security fee].) As there was no other fine on which to base these assessments, the court exceeded its jurisdiction in imposing them. (See *People v. McHenry* (2000) 77 Cal.App.4th 730, 732.)

We reverse the $120 state penalty assessment (§ 1464), the $24 state criminal surcharge (§ 1465.7), both $60 DNA assessments (Gov. Code, §§ 76104.6, 76104.7), and the $60 court construction assessment (Gov. Code, § 70372). The abstract of judgment must be amended to remove the assessment, penalties, and surcharge, as well as the $300 parole revocation fine (§ 1202.45) and the extraneous $30 court facilities assessment (Gov. Code, § 70373) discussed above. (*People v. Hamed* (2013)

221 Cal.App.4th 928, 940 [abstract of judgment must list fines, penalties, surcharge]; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [superior court clerk must specify fines, penalties, surcharge in abstract of judgment].)

DISPOSITION

The penalty assessments are reversed—specifically, the $120 state penalty assessment (Pen. Code, § 1464), the $24 state criminal surcharge (Pen. Code, § 1465.7), the $60 DNA assessment (Gov. Code, § 76104.6), the other $60 DNA assessment (Gov. Code, § 76104.7), and the $60 court construction assessment (Gov. Code, § 70372). The $300 parole revocation fine (§ 1202.45) is also reversed. The judgment is modified to impose only three Government Code section 70373, subdivision (a)(1) court facilities assessments totaling $90. In all other respects, the judgment is affirmed as modified.

Upon issuance of the remittitur, the court is directed to amend the minute order of November 19, 2013, and the abstract of judgment to reflect the judgment as modified and to send a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

I CONCUR:

ALDRICH, J.

LAVIN, J., Dissenting:

In 2008, defendant Joseph Carl Stanley, a 59-year-old Nevada resident last convicted of a felony in 1978, was visiting his family in South Los Angeles when a drug dealer and the dealer's brother were shot and killed. No physical or fingerprint evidence connected Stanley to the crime, and the gun was never found. The only evidence of Stanley's guilt came from the contradictory statements of an in-custody murder suspect and the cross-racial identification by an eyewitness—a man who could not identify Stanley until he saw him in court a year and a half after the shooting, handcuffed to a chair, wearing a jumpsuit issued by the county jail. Stanley was the only African-American in the room. Other evidence placed Stanley in the neighborhood around the time of the shooting and indicated he might have tried to buy drugs from one of the victims—but none of it connected Stanley to the murders. Stanley was nevertheless charged with two counts of special-circumstance murder, convicted, and sentenced to life in prison without the possibility of parole.

On these facts, the majority rejects Stanley's challenge to the sufficiency of the evidence and affirms under the procedural doctrine of law of the case.[1] But law of the case is a chimera here.

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[1] Because I would reverse based on the violation of California's Double Jeopardy Clause, I do not reach the issue of sufficiency of the evidence to support the conviction. In light of the contradictory, suggestive, and tainted eyewitness identifications, the lack of physical evidence connecting Stanley to the crimes, and the absence of any apparent motive, there are, however, real concerns about actual innocence in this case.

In reality, it is a prudential rule of judicial procedure. The doctrine acknowledges this court's power to fix its mistakes, and it does not absolve us from reckoning with them.

By not grappling with the prior opinion in any real way, the majority elevates procedural convenience over constitutional rights—then misapplies the procedural rule. (*Stanley v. Superior Court* (2012) 206 Cal.App.4th 265 (*Stanley I*).) As the People concede, *Stanley I* did not consider the retroactive application of its decision—and it cannot bind this court on that issue. Law of the case, therefore, does not excuse the majority's refusal to answer a central question of this case: When a defense attorney reasonably relies on a half-century of Supreme Court precedent to decide that he should not object to an unwarranted mistrial, does his client forfeit his rights under the Double Jeopardy Clause?

Stanley I was not just wrong on the law, however. It also disregarded Stanley's right to an evidentiary proceeding to resolve disputed factual issues concerning implied consent. Because it is manifestly unjust to apply the law-of-the-case doctrine under these circumstances, and because Stanley was deprived of the sacred constitutional right not to be placed twice in jeopardy, the judgment should be reversed.

I respectfully dissent.

DISCUSSION

The double jeopardy clauses of the federal and state constitutions bar retrial of a criminal defendant after an acquittal. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15;

People v. Batts (2003) 30 Cal.4th 660, 679–680; *Curry v. Superior Court* (1970) 2 Cal.3d 707, 712 (*Curry*).)[2] "The right not to be placed twice in jeopardy for the same offense is as sacred as the right to trial by jury. [Citation.] 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329.)

"It follows that a criminal defendant who is in the midst of trial has an interest, stemming from the double jeopardy clause, in having his or her case resolved by the jury that was initially sworn to hear the case—and in potentially obtaining an acquittal from that jury. (See *Wade v. Hunter* (1949) 336 U.S. 684, 689

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[2] Though the Fifth Amendment provides minimum standards for protection against double jeopardy, a state may accord criminal defendants greater protection under its state constitution. (*Benton v. Maryland* (1969) 395 U.S. 784, 795–796; *People v. Fields* (1996) 13 Cal.4th 289, 298.) California courts frequently interpret our state Double Jeopardy Clause more broadly than its federal counterpart. (*People v. Batts*, *supra*, 30 Cal.4th at pp. 685–689; see, e.g., *People v. Hanson* (2000) 23 Cal.4th 355, 358–360, 363–367 [in California, appellate reversal precludes more severe punishment after retrial]; *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 275 [rejecting federal rule that mistrial on court's own motion did not violate double jeopardy].)

[noting a defendant's 'valued right to have his trial completed by a particular tribunal'].)" (*People v. Batts*, *supra*, 30 Cal.4th at p. 679.) Thus, once a jury trial begins—that is, once jeopardy has attached—discharge of the jury without a verdict amounts to an acquittal and prevents a retrial unless legal necessity justified the court's action. (*Ibid.*; *United States v. Jorn* (1971) 400 U.S. 470, 486–487.) Legal necessity exists "where physical causes beyond the control of the court such as the death, illness or absence of a judge, juror or the defendant make it impossible to continue. [Citation.] Legal necessity has also been found where it becomes necessary to replace defense counsel during trial due to the disappearance of counsel at a critical stage of trial." (*People v. Brandon* (1995) 40 Cal.App.4th 1172, 1175.)

A defendant may also consent to a mistrial, either expressly or impliedly, and thereby waive any later double jeopardy claim. (*People v. Batts*, *supra*, 30 Cal.4th at pp. 679–682.) Implied consent exists where a defendant's "affirmative conduct . . . clearly evidences consent" to a mistrial. (*Curry*, *supra*, 2 Cal.3d at p. 713.) For example, a defendant may signal his consent if he "actually initiates or joins in a motion for mistrial [citation]." (*Ibid.*) But consent will not be inferred from silence, failure to object to a proposed order of mistrial, or raising an issue of concern. (*Ibid.*; *People v. Compton* (1971) 6 Cal.3d 55, 62–63 (*Compton*).)

At Stanley's first trial, 12 jurors and four alternates had been empaneled and sworn when the court declared a mistrial on its own motion. Thus, the Double Jeopardy Clause barred Stanley's retrial unless the mistrial was supported by manifest necessity or Stanley's express or implied consent. The parties agree that neither legal necessity nor express consent justified

the mistrial in this case. (See *Stanley I*, *supra*, 206 Cal.App.4th at p. 279, fn. 22; *Stanley v. Baca* (9th Cir. Feb. 19, 2014, No. 13-56172) 555 Fed.Appx. 707, 708 (*Stanley II*).) The question in *Stanley I*, therefore, was whether Stanley impliedly consented. (*Stanley I*, *supra*, at pp. 287–289.) Stanley argues there was no implied consent, and asks us to reconsider *Stanley I*, in which a different panel of this court rejected that argument in a writ proceeding. The People argue that the doctrine of law of the case requires us to follow *Stanley I*. The majority, relying on *Stanley I* for the premise that *Stanley I* was a just decision, accepts this view.

Law of the case is only one of the issues before us, however. After the time for normal briefing had elapsed, we asked the parties to submit letter briefs answering a question raised in the petition for rehearing in *Stanley I*, but never answered by the prior panel: Should the rule announced in that opinion apply retroactively to Stanley? In response, Stanley argues that in "an abrupt departure from" California Supreme Court precedent, *Stanley I* "for the first time required defense counsel [to] disabuse the trial court of the assumption that counsel consented to a mistrial." Because the clear weight of authority previously held that he had no obligation to act, Stanley contends he should not be penalized for failing to do so. The People, on the other hand, argue that *Stanley I* "did not establish new standards or a new rule of law, but only elucidated prior law." Because the prior opinion did not announce a new rule, the People argue, retroactivity principles do not apply. The majority does not address either party's arguments. Instead, it relies on dictum from an inapt civil case to conclude that *Stanley I* impliedly

decided the retroactivity question and is therefore law of the case on that issue.

Yet even if *Stanley I* is law of the case on every issue before us, it "should not be applied woodenly in a way inconsistent with substantial justice." (*United States v. Miller* (9th Cir. 1987) 822 F.2d 828, 832.) As I will explain, *Stanley I* is not just wrong on the law. The prior panel, through its decision, also improperly appropriated the role of trier of fact, denied Stanley's express request for an evidentiary hearing, then resolved the disputed factual issues itself. Although efficiency and finality are important concerns underlying law of the case, procedural convenience should not trump correction of a clearly erroneous prior decision that violates a criminal defendant's fundamental constitutional rights.[3]

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[3] The majority's opinion extols the principle of finality, but overlooks the caveat that finality means different things in different contexts. In a case such as this, when a party seeks reconsideration of questions decided at an earlier stage of a single, continuing litigation, we would not upset a final judgment in another proceeding. A final judgment makes a difference: It marks a formal point at which considerations of economy, certainty, reliance, and comity take on more strength than they have before the judgment is entered. As for efficiency, few additional judicial resources would be expended if the majority reached the merits of Stanley's double-jeopardy claim—but by failing to reach the merits, the majority has ensured that the federal courts will ultimately have to resolve the issues presented here. In any event, when interests of efficiency and finality clash with the responsibility of this court not to issue a final judgment wrong on the facts and wrong on the law, we should err on the side of being right.

I begin by reviewing the events below, then address each issue in turn.

1. The First Trial

On Friday, November 4, 2011, 12 jurors and four alternates were sworn to try the case against Stanley. By the end of the day, the court had dismissed Juror 3 and ordered him to appear at a contempt hearing. On Monday morning, the parties agreed to excuse an alternate, Juror 32, who had childcare problems. At that point, two alternate jurors remained.

Meanwhile, Juror 4 asked to be excused because his fiancée had broken her ankle the night before and was too scared to stay home alone. The court was incredulous, but did not want to question Juror 4 in detail: "I mean the questions I would have to ask would be of an attack mode so I mean—his whole explanation assumed something that I don't assume, but I can't get into it. I don't know why a grown woman cannot stay downstairs for the day, but I don't know the configuration of his house. This is something I cannot get into, and I see no choice unless you have something better."

Defense counsel expressed reluctance to excuse Juror 4, and encouraged the court to inquire further: "I don't want the court to go into an area the court feels it can't go into. But whether there is any alternative to him being absent, any alternative to him being the sole caretaker at this point—" In response, the court asked, "Juror number 4, is there any alternative that you can live with that would allow you to participate in this trial and you are comfortable that your fiancé[e] could be taken care of during the day?" Juror 4 did not volunteer a solution, and neither party asked to excuse Juror 4—then or later. At a minimum, there are disputed factual issues as

to whether the court intended to excuse this juror and whether defense counsel wanted to keep him. Though counsel expressly asked the court to excuse Juror 3 and Juror 32, he tried to rehabilitate Juror 4. By the time the court declared the mistrial, no decision about Juror 4 had been made. The court told Juror 4 to wait in the hallway.

Juror 6 came next. He had arrived late that morning. Upon entering the courtroom, Juror 6 produced a document on Kaiser Permanente letterhead purporting to release him from jury service for two days. Juror 6 explained that he had contracted conjunctivitis—commonly known as pinkeye—and was highly contagious. He had gone to the doctor the previous day and was receiving treatment, but he needed to stay home on Monday and Tuesday of that week. He could return to court on Wednesday, November 9, 2011.

The court was willing to continue the trial for two days to accommodate Juror 6, but told the attorneys, "If that's not what you want to do, we'll move on that too." Defense counsel did not respond. At this point, the court had excused Juror 3 and Juror 32, leaving two alternate jurors remaining. Juror 4 (fiancée ankle problem) was in the hallway awaiting a decision. It was in this context that the court said, "I want to go back to this. If you don't want to wait for this [Juror 6], this person is gone also, and then you have maybe one left over [Juror 4]." The prosecutor, apparently believing Juror 4 had been excused, replied, "I don't think we have any."[4]

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[4] The record does not support the prosecutor's belief, and defense counsel did not correct her. The *Stanley I* court, however, viewed this statement as evidence that the court intended to

Without responding to the prosecutor's remark, the court continued, "The bottom line is, when this case goes, if this case goes, you let me know what you want to do. This person [Juror 4], I haven't heard a decision on him yet, and we are down three people at this point. [Jurors 3, 32, and 6]. Also what I want to say is, *if we are down to no alternates*, when I call them in the room before we go any farther, I'm going to say look, I don't know exactly when this will end at this point. You could be here until the last week in November. I don't know. I cannot do that. Let me know right now. If somebody raises their hand, we are done. . . . The bottom line is we are done." (Emphasis added.)

Though the record is unclear, it appears that the attorneys were having a side conversation about Juror 6 as the court

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excuse Juror 4. (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 268, 272, fn. 4–6.) In any event, delaying the trial by two days to accommodate Juror 6 and his pinkeye opened up additional possibilities for Juror 4. Juror 4 had repeatedly emphasized that but for his fiancée's broken ankle, he was ready to serve. His fiancée's mishap and trip to the emergency room had happened just the night before. That morning, when Juror 4 spoke with the court, the fiancée was having trouble with her crutches and was nervous about navigating the stairs alone. Juror 4 explained, "she has a hard time getting around with the crutches." Then emphasized, "she's having a hard time with the crutches." And again, "She's afraid to walk around . . . with the crutches." But it is also clear she was learning to use them. After only a few hours, the fiancée was able to get up the stairs unassisted; she only needed help getting back down. For everything else, she used a wheelchair. Whether delaying the trial for two days was feasible or would have resolved Juror 4's problem is another material factual issue that was never resolved.

finished its remarks. Defense counsel explained, "Right now where we are at, the only problem I have is making sure my expert's testimony—[.]" The implication was that if the defense expert could be accommodated, counsel was willing to delay the trial to keep Juror 6—that is, accommodating the expert was "the only problem" counsel had with continuing the trial for two days. The prosecutor agreed: "I don't mind taking her testimony out of order. I think we should wait for him [Juror 6]. I would rather have at least one alternate. That makes me uncomfortable without an alternate." Defense counsel did not correct the prosecutor's mistaken belief that Juror 4 had been excused and did not respond to the prosecutor's preferences or discomfort. At that point, the prosecutor turned to the court and summarized, "I would like to keep [Juror 6] than not have any alternates. If it means waiting until the 9th, that's okay with me, and I'm letting [defense counsel's] witness testify out of order." Defense counsel remained silent. The court replied, "All right. All right. Thank you."

The court then reconvened the jury and explained the situation to the remaining jurors. At this point, there were twelve sitting jurors and two alternates, including Juror 4 (fiancée ankle problem), who had not been excused, and Juror 6 (pinkeye) who would be able to resume his jury service in two days. The court concluded: "Here's the issue in a nutshell. Because we are so short of jurors, I'm not even going to start this if somebody tells me you can't do it. I don't want to invest the time and bring in all witnesses and do what we have to do if somebody believes they can't do this. All you need to do is raise your hand, and I will tell them that it's done at this point because I cannot risk doing this. I see your hand. I will talk to you. All

of a sudden—that's what is really funny with people like you. If you had done that when we were doing voir dire, we wouldn't be in this position. You have no problem now, but when you thought you would not be selected, it was okay. As soon as you got selected, then you are telling me, no, no, no, no, no. That's all I ask, that's all I ever ask, just tell me what your condition is. When people hide that, it puts us in a bad, bad, bad place. Again, please raise your hand, if you cannot do it."

In response to the court's solicitations—"if somebody tells me you can't do it," "[a]ll you need to do is raise your hand, and I will tell them that it's done[,]" "just tell me what your condition is," "please raise your hand, if you cannot do it"—Juror 2 raised his hand. The court asked him, "You cannot do it?" Juror 2 replied, "I don't think so because I had a heart attack. I called up the doctor, seen a doctor." Without inquiring further, the court called the attorneys to sidebar. The court said, "I believe they win." Both attorneys remained silent.

The court excused the jury and left the courtroom. After a recess, the court returned and declared a mistrial.[5] He explained, "We simply do not have qualified jurors who can serve,

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[5] While *Stanley I* implies that the court declared a mistrial immediately after excusing the jury (*Stanley I*, *supra*, 206 Cal.App.4th at p. 276), the record does not support that view. In any event, as the Ninth Circuit points out, "it is unclear how much time passed between the dismissal of the jury and the declaration of mistrial, [or] whether the jury could have been recalled had an objection been lodged immediately upon declaration of mistrial . . . . " (*Stanley II*, *supra*, 555 Fed.Appx. at pp. 708–709.)

and as a result, it was agreed that if we would have had only 12 jurors, we would start over, and, in addition, I believe it was number 2 that made it fairly clear in all probability we would not have even one alternate before this was over with. [¶] Subject to attorney input, I propose to put this matter out to December the 4, 45 of 60, January 4, 2012. [¶] There you have it."

Defense counsel replied, "Your Honor, I'm assuming that that is the earliest possible date. **Obviously we are unhappy with the way things proceeded this morning**, and I know that Mr. Stanley is anxious to get the matter to trial, and I also know this court has its other calendar matters. Is the 22nd the earliest we can conceivably—[.]" (Emphasis added.) At that point, the court cut him off and said, "That's when I'm going to set it." The prosecutor remained silent throughout this exchange.

2. What *Stanley I* Held—and What it Did Not Hold

In California, a defendant's consent to a mistrial cannot be implied by mere silence; there must be "affirmative conduct . . . that clearly evidences consent[.]" (*Curry*, *supra*, 2 Cal.3d at p. 713; *Compton*, *supra*, 6 Cal.3d at pp. 62–63.) Acknowledging this rule, the panel in *Stanley I* concluded this was not a case of passive silence. "While it is true that defense counsel in this case was silent when given a final opportunity to object immediately before the declaration of a mistrial," the panel held, "he had previously fully participated in the discussion and led the trial court to believe, through his actions and express statements, that he consented to the procedure ultimately followed by the court." (*Stanley I*, *supra*, 206 Cal.App.4th at p. 288.) Construing this participation as affirmative conduct, the panel held counsel's actions were sufficient to support the trial court's belief that Stanley consented to the mistrial, and

therefore to support a further finding of implied consent. (*Id.* at pp. 287–289.)

Specifically, *Stanley I* held defense counsel's affirmative conduct implied consent where counsel: remained silent when the court outlined its plan to dismiss the jury if no alternates remained and any remaining juror objected to a two-day continuance (*Stanley I*, *supra*, at pp. 270, 273, 276, 289, 293–294); told the prosecutor his "only problem" with continuing the trial for two days was making sure his expert could testify (*id.* at pp. 273, 289, 293); remained silent when the prosecutor said she wanted to preserve at least one alternate juror (*id.* at pp. 272–274, 277, 289, 293); remained silent when the court invited the remaining jurors to declare additional conflicts (*id.* at pp. 275, 293 & fn. 12); remained silent when the court dismissed the jury—a dismissal that violated the alleged agreement *Stanley I* gleaned from the record, since two alternates remained at that point (*id.* at pp. 276, 279, 289, 293); and participated in discussions about a new trial date without objecting to the new trial itself (*id.* at p. 277). The court also concluded that when he remained silent, "counsel was aware, or should have been aware," that his previous silences had "led the trial court to reasonably believe" that he consented to the mistrial. (*Id.* at pp. 289, 293–294.)

In sum, *Stanley I* did not find implied consent where defense counsel remained silent *while* the court declared the mistrial; instead, it found implied consent where defense counsel remained silent *before* and *after* the court declared a mistrial—that is, from counsel's pre-silence silence and his post-silence

silence. (*Stanley I, supra,* 206 Cal.App.4th at p. 288.)[6] Together, the court concluded, these silences constituted "affirmative conduct . . . [that] clearly evidences consent" to a mistrial. (*Curry*, *supra*, 2 Cal.3d at p. 713.)

Following this holding, Stanley filed a timely petition for rehearing seeking the opportunity to argue that the new rule should only be applied prospectively—an issue the court did not address in its opinion. The court summarily denied the petition.

2.1. Law of the case applies only to issues that were actually addressed in the prior opinion.

Under the law of the case doctrine, when an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." (*People v. Stanley* (1995) 10 Cal.4th 764, 786.) "The doctrine, as the name implies, is exclusively concerned with issues of law and not fact." (*People v. Shuey* (1975) 13 Cal.3d 835, 842.)

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[6] Although it erected a complicated structure that implies otherwise, *Stanley I* ultimately imposed a forfeiture for a simple failure to object. Even if counsel *did* impliedly agree not to proceed without at least one alternate, an issue that itself is subject to varying interpretations, the court below did not abide by that agreement. When the court dismissed the jury, two alternates remained. Thus, the only silences that really mattered were counsel's failure to object immediately before the court dismissed the jury and his failure to object to the later declaration of mistrial.

The law-of-the-case doctrine applies only to issues that were actually addressed in the prior opinion. It does not apply to issues that could have been raised, but were not. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.) Thus, the legal rule announced in *Stanley I*—that ambiguous silence could constitute the sort of affirmative conduct that clearly evidences consent to a mistrial—is arguably law of the case. But, as the People concede, since *Stanley I* did not consider whether that rule should apply retroactively to Stanley, the question of retroactivity is *not* law of the case. (See *City of Oakland v. Oakland Raiders* (1985) 174 Cal.App.3d 414, 418 [law of the case does not apply to issues that were not squarely presented and determined by prior appeal, even when addressed in an unsuccessful petition for rehearing].)

2.2. *Stanley I* did not implicitly decide retroactivity.

The People's explicit concession of this long-settled principle notwithstanding, the majority insists that the "doctrine of law of the case is applicable not only to questions expressly decided but also to questions implicitly decided because they were essential to the decision on the prior appeal. [Citation.] Although *Stanley I* did not expressly address the issue of retroactivity, *Stanley I* implicitly decided the retroactivity issue in the People's favor" by denying the writ petition. (Maj. opn., at p. 21.)

In support of its novel conclusion, the majority shuns recent binding authority that is directly on point in favor of dictum from a 1983 civil case, *Olson v. Cory*—dictum that itself rests on a disapproved interpretation of an even older case.

(*Olson v. Cory* (1983) 35 Cal.3d 390, 399; *Davis v. Edmonds* (1933) 218 Cal. 355, 358–359 (*Davis*).)[7] Decided in 1933, *Davis* involved a relatively discrete issue—how does an appellate holding about the failure to object to evidence impact a related evidentiary issue in a second appeal? (*Davis*, *supra*, at pp. 358–359.)[8] *Davis* thus stood for a much narrower proposition than the rule attributed to it in Witkin and *Nevcal*. (See 3 Witkin, Cal.

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[7] *Olson* quoted dictum from a 1971 probate case, which held that a prior appeal did *not* implicitly decide the USSR's jurisdiction over a decedent's American heirs. (*Estate of Horman* (1971) 5 Cal.3d 62, 73.) *Horman*, in turn, relied on a 1963 appeal about whether a Nevada court implicitly decided it had jurisdiction over a contract dispute. (*Nevcal Enterprises v. Cal-Neva Lodge, Inc.* (1963) 217 Cal.App.2d 799, 804 (*Nevcal*).) *Nevcal* based its conclusion on two sources, the 1954 edition of Witkin and a 1938 Supreme Court case (*Coats v. General Motors Corp*. (1938) 11 Cal.2d 601, 607; 3 Witkin, Cal. Procedure (1954) § 216, p. 2429), both of which gleaned their rules from an even earlier case, *Davis*, *supra*, 218 Cal. at pp. 358–359. Thus, *Olson* and *Horman* necessarily relied on *Davis* when they quoted *Nevcal*.

[8] In reaching this conclusion, *Davis* relied on another treatise, the 1921 version of California Jurisprudence, which dealt specifically with the future legal impact of evidentiary rulings. (2 Cal.Jur. (1921) § 569, pp. 967–968 ["A decision as to the admissibility of evidence is a decision of a question of law and is law of the case and is conclusive when the same question is raised on a subsequent appeal."].) As a general matter, however, that treatise cautioned that "of course, the [prior] decision is only law of the case as to what was actually adjudicated." (*Ibid*.)

Procedure, *supra*, at p. 2429; *Nevcal*, *supra*, 217 Cal.App.2d at p. 804.)

Thirty years later, in *DiGenova v. State Board of Education*, the Supreme Court impliedly disapproved any broader interpretation of *Davis* when it reversed an appellate decision that had relied heavily on the 1933 opinion. (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 178–179 (*DiGenova*).) In *DiGenova*, the Court held that the opinion in a prior appeal did **not** impliedly decide retroactivity, and was not law of the case on that issue. (*Ibid*.) The Court also noted that applying the doctrine to the retroactivity question before it "would 'exalt form far above substance' and would result in a 'most unjust decision.' " (*Id*. at p. 179.) This represented a break with the doctrine's older, more draconian framework—and with those courts that read *Davis* as taking an expansive view of implied holdings. In the years since *DiGenova*, whenever the Court has addressed law of the case in any substantive way, it has hewed to these principles.[9]

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[9] See, e.g., *People v. Medina* (1972) 6 Cal.3d 484, 492–493 (relying on *DiGenova* to conclude law of the case does not apply to summary denial of pretrial writ petitions); *People v. Shuey*, *supra*, 13 Cal.3d at pp. 840–848 (examining *DiGenova* and rejecting pre-*DiGenova* view of law of the case); *Kowis v. Howard*, *supra*, 3 Cal.4th at pp. 892–902 (rejecting, based in part on *Medina* and *DiGenova*, the "sole possible ground" exception to the express-determination rule, citing *Shuey*, and expressly overruling another prior opinion that accorded law-of-the-case status to any implied holding " 'necessary to the prior decision' "); *People v. Stanley*, *supra*, 10 Cal.4th at pp. 786–790 (relying on *Medina*, *Shuey* and *Kowis*).

Nor can *Olson*'s later reliance on *Nevcal* be construed as redeeming *Davis*. "A precedent cannot be overruled in dictum, of course, because only the ratio decidendi of an appellate opinion has precedential effect [citations]; to hold otherwise . . . would be to conclude that a statement by this court that *is not* a precedent can somehow abrogate an earlier statement by this court that *is* a precedent. This is not the law." (*Trope v. Katz* (1995) 11 Cal.4th 274, 287) In short, *Olson* is bad law.[10]

In any event, the majority's conclusion fails even under the Cal.Jur.-*Davis-Nevcal-Horman-Olson* rule. The full quote from *Nevcal* on which *Olson* and *Horman* rely clarifies that any exception for necessarily determined issues is exceedingly narrow: "The rule seems now to be fairly well settled that 'Where the particular point was *essential to the decision*, **and** the appellate judgment *could not have been rendered* without its determination, a necessary conclusion in support of the judgment

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[10] The majority objects to this characterization of *Olson* and insists that because the *Olson* dicta has not been explicitly disavowed, they are obligated to follow it under *Auto Equity Sales*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Yet as the majority implicitly acknowledges, *Auto Equity Sales* only applies to holdings; the Court's dicta, while entitled to our respect, is not binding precedent. (Cf. *People v. Wiley* (1995) 9 Cal.4th 580, 587–588 [prior Supreme Court decision's brief mention of state constitutional right to a jury trial not a "considered decision" determining scope of California constitutional right to a jury trial].) On the other hand, we *are* obligated to follow the holdings in the half-dozen cases discussed above—just as *Stanley I* was required to follow *Curry* and its progeny.

is that it was determined.' [Citation.]" (*Nevcal*, *supra*, 217 Cal.App.2d at p. 804, bold emphasis added; accord *Eldridge v. Burns* (1982) 136 Cal.App.3d 907, 921 [exception applies only if "appellate judgment could not have issued without its determination"]; *Estate of Roulac* (1977) 68 Cal.App.3d 1026, 1031 ["The point relied upon as law of the case must have been essential to the decision before the doctrine of the law of the case can be invoked [citations]. Because our comment in the earlier decision, relied on here to invoke the doctrine of the law of the case, was not essential to the decision, it does not preclude us from considering the issue which is raised and argued for the first time on this appeal."].) Unlike fundamental jurisdiction, which was the narrow issue presented in *Nevcal* and *Horman*, the *Stanley I* court **could** have rendered the judgment without considering retroactivity.

Retroactivity is therefore properly before this court. Because resolution of that issue determines whether we must apply law of the case, I address it in detail in the next section.

3. Retroactivity of the rule announced in *Stanley I*

"Although as a general rule judicial decisions are to be given retroactive effect, there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied." (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378–379, internal citations omitted.)

"In determining whether a decision should be given retroactive effect, the California courts undertake first a threshold inquiry, inquiring whether the decision established new standards or a new rule of law. If it does not establish a new rule or standards, but only elucidates and enforces prior law, no question of retroactivity arises." (*Donaldson v. Superior Court*

(1983) 35 Cal.3d 24, 36.) A decision involves a "clear break from the past" and raises an issue of retroactivity where it " 'explicitly overrules a past precedent[,]' " disapproves a practice the Supreme Court "has arguably sanctioned in prior cases [citations], or overturns a longstanding and widespread practice" that " 'a near-unanimous body of lower court authority has expressly approved.' " (*Id.* at p. 37 [case established new standard where it disapproved a practice arguably sanctioned by prior decisions] quoting *United States v. Johnson* (1982) 457 U.S. 537, 551.)[11]

3.1. *Stanley I* departed from prior case authority.

As discussed, a defendant's consent to a declaration of mistrial cannot be inferred from mere silence. (*Curry*, *supra*,

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[11] The People cite *People v. Martinez* (1999) 20 Cal.4th 225 for the proposition that retroactivity issues are relevant to a criminal case only if the case involves the unforeseeable expansion of criminal conduct in violation of the Ex Post Facto Clause. While *People v. Martinez* addressed the expansion of a criminal statute, it did *not* hold that retroactivity principles applied only in those circumstances. To the contrary, the Court recognized that in cases "not implicating ex post facto and due process" concerns, the "retroactivity analysis . . . focuses on reliance and policy considerations[.]" (*Id.* at p. 238; see, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 136–137 [no due process or reliance problems where court retroactively applies decision overruling prior rule that defendants had the right to jury instructions on lesser-related offenses]; *People v. Welch* (1993) 5 Cal.4th 228, 237–238 [declining to apply new forfeiture rule to defendant's case since prior case law overwhelmingly stated no objection was required].)

2 Cal.3d at p. 713; *Compton*, *supra*, 6 Cal.3d at p. 62.) However, "affirmative conduct by the defendant may constitute a waiver if it *clearly evidences* consent." (*Curry*, at p. 713, emphasis added.) The People argue *Stanley I* did not create a new rule because "the inadequacy of 'mere silence' to imply consent to a mistrial but the adequacy of affirmative conduct to do so" had been established before *Stanley I*. Thus, they contend, Stanley had "ample notice that affirmative conduct could imply consent to a mistrial."

Be that as it may, *Stanley I* was the first case to hold that *ambiguous silence* can constitute affirmative conduct sufficient to clearly evidence consent. (See, e.g., *Stanley I*, *supra*, 206 Cal.App.4th at p. 275 [discussing "proper interpretation of possibly ambiguous statements of defense counsel"] & fn. 12 ["The record strongly implies that defense counsel agreed with the court's procedure. Even if defense counsel did not agree with it, he allowed the court to believe that he did."].) Whatever the merits of that holding, it departs from nearly 50 years of California case law that reached the opposite conclusion. (See *People v. Scott* (1994) 9 Cal.4th 331, 357–358 & fn. 19 [applying rule prospectively where other cases had required the defendant to object to *omitted* sentencing factors, but instant case was the first to require an objection to *invalid* sentencing factors].)

Until *Stanley I*, California courts had always placed strict limits on the types of affirmative conduct that could imply a defendant's consent to a mistrial. Taken together, these cases held that a defendant's consent must be so strongly implied that it could not be misunderstood. While a defendant manifested implied consent with actions, and manifested express consent with words, the two forms of consent were functionally equivalent. Under this view of the law, "affirmative conduct"

that "clearly evidences consent" required something more than mere silence in the face of a prosecutor's preferences and a trial judge's confusing, angry monologue—actions *Stanley I* held were sufficient.[12]

The leading case on this issue is *Curry v. Superior Court.* (*Curry*, *supra*, 2 Cal.3d 707.) In *Curry*, a prosecution witness testified on cross-examination that she had been under psychiatric care, and testified on redirect examination that a third person told her the defendants' friends would shoot her. The defendants asked the court to instruct the jury that the third parties' statements—which they considered extremely prejudicial—could not be attributed to them. They did not request a mistrial. The trial court nevertheless concluded that it would be impossible for either the prosecution or the defendants to have a fair trial, and declared a mistrial on his own motion.

The Supreme Court concluded the defendants did not impliedly consent to this course of action. While affirmative conduct that clearly evidences consent may amount to a waiver—such as when a defendant expressly moves for mistrial—the request for jury instructions did not meet this test. (*Curry*,

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[12] *Stanley I* continues to be an outlier in this regard. In the four-and-a-half years since its publication, no other California court has adopted its approach. (Compare, e.g., *People v. Sullivan* (2013) 217 Cal.App.4th 242, 247 [no implied consent where, after the court declared a mistrial, defense counsel participated in discussions about a new trial date without objecting to the new trial itself] with *Stanley I*, *supra*, at p. 277 [significant that counsel participated in discussions of a new trial date without objecting to the new trial itself].)

supra, 2 Cal.3d at p. 713.) Nor did the defendants' failure to object forfeit the issue. The Court concluded that when a judge proposes to discharge a jury without legal necessity, "the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver." (*Ibid*.)

The Court based its holding on a criminal defendant's right to proceed with his chosen jury. It explained that a "defendant may choose not to move for or consent to a mistrial for many reasons. He may be of the opinion that no error in fact occurred, or if it occurred, that it was not prejudicial. . . . Indeed, even when a palpably prejudicial error has been committed a defendant may have valid personal reasons to prefer going ahead with the trial rather than beginning the entire process anew . . . . These considerations are peculiarly within the knowledge of the defendant, not the judge, and the latter must avoid depriving the defendant of his constitutionally protected freedom of choice in the name of a paternalistic concern for his welfare." (*Curry*, *supra*, 2 Cal.3d at pp. 717–718.) Accordingly, the Court concluded, "except in the limited instances of 'legal necessity,' the policy underlying the prohibition against double jeopardy will best be served by firmly adhering to the rule that after jeopardy has attached no mistrial can be declared save with the defendant's consent." (*Ibid*.)

The Court's opinion in *Compton* expanded this holding. (*Compton*, *supra*, 6 Cal.3d 55.) In *Compton*, defense counsel learned an alternate juror told his barber, mid-trial, that it was difficult for him to keep an open mind. Counsel brought this fact to the court's attention and requested further inquiry. He

explained that the juror's remarks were "harmful" and his conduct " 'undermines one of the very basic premises of the jury system. This juror is trifling with my client's natural life.' " (*Compton,* at p. 63, fn. 7.) The court questioned the alternate juror, then, without objection, declared a mistrial. (*Id.* at p. 59.) Before doing so, the court asked both parties, " 'do any of you have any strong objections to what I am going to do? Let me know now, but I think that is the only recourse.' " The prosecutor replied, " 'No comment, your Honor.' The court then asked defense counsel if he had 'anything further,' and the latter replied simply, 'No, your Honor.' " (*Id*. at p. 63.)

Compton found no implied consent in these circumstances, noting: "The circumstance that it is defense counsel who initiates the court's inquiry into a matter which ultimately results in an order of mistrial does not ipso facto transform counsel's expression of concern into an implied consent to such drastic ruling." (*Compton*, *supra*, 6 Cal.3d at p. 62.) The Court also rejected the assertion that it could infer consent from counsel's failure to object, despite the express opportunity to do so. (*Id.* at p. 63 ["The effect of a failure to object is no longer an open question"]; accord *Larios v. Superior Court*, *supra*, 24 Cal.3d at pp. 327–332 [no necessity or implied consent where defense counsel asked the court to inquire into juror's independent investigation, juror testified that improperly-obtained information would prevent him from judging the case fairly, no alternate jurors were available, defense counsel would not stipulate to an 11-person jury, and counsel remained silent in the face of the ensuing declaration of mistrial].)

The Court expanded the rule again in *People v. Upshaw* (1974) 13 Cal.3d 29 (*Upshaw*). In that case, the Court held that

silence could not imply consent even where defense counsel's misstatements of law caused the need for the mistrial. (*Id.* at p. 34.) The Court explained that the "purpose of the constitutional provision against double jeopardy is to prevent harassment of a defendant by repeated trials on the same criminal charge. [Citation.] This purpose would be frustrated were we to allow remarks of counsel, even if legally untenable, to result in a vicarious waiver by the defendant of his constitutional protection against double jeopardy." (*Ibid.*)

In each of these cases, the Court considered whether a defendant has a duty to act to prevent an unnecessary mistrial. In *Curry*, the Court concluded the defense has no duty to help the trial court correct legal or factual errors. In *Compton*, the Court found no duty to act where counsel initiated the inquiry that ended in an unnecessary mistrial. And in *Upshaw*, the Court found no duty to act where counsel's own errors and misstatements led to the mistrial. The California Supreme Court has not reconsidered these holdings in the 40 years since *Upshaw*—and has continued to rely on them. (See, e.g., *People v. Batts*, *supra*, 30 Cal.4th at pp. 687–688 [describing *Curry* as "construing [the] state double jeopardy provision to bar retrial after the granting of a mistrial on the trial court's own motion and without the defendant's consent, but for the defendant's benefit, and declining to adopt the applicable federal constitutional rule"]; *People v. Chatman* (2006) 38 Cal.4th 344, 368 [citing *Upshaw* for conclusion that defendant could not argue the court should have granted a mistrial he did not request since "the strictures of double jeopardy . . . severely restrict such an action."]; *People v. Saunders* (1993) 5 Cal.4th 580, 592 & fn. 6 [no objection required to preserve double jeopardy claim].)

The intermediate appellate courts have gleaned two fundamental principles from *Curry*, *Compton*, and *Upshaw*—that defense counsel has no duty to act to prevent an unnecessary mistrial, and that a reviewing court should not lightly presume implied consent to a mistrial. (See *People v. Overby* (2004) 124 Cal.App.4th 1237, 1244 ["the courts have deliberately declined to impose a duty upon the defendant to forewarn the trial court of legal error that will permit the defendant to assert the defense of double jeopardy in subsequent proceedings. It is because the defendant has no obligation to alert the trial court that it is about to err in a manner that sets up a double jeopardy defense that the defendant's silence does not constitute waiver or consent when the court declares a mistrial without legal necessity."].) Consequently, while courts have occasionally found "affirmative conduct" that "clearly evidences consent" to a mistrial (*Curry*, *supra*, 2 Cal.3d at p. 713), they have done so only when counsel acts in a manner that cannot be misunderstood.

In *People v. Boyd*, for example, a defense witness was leaving the courtroom for lunch when officers arrested him in full view of the jury. (*People v. Boyd* (1972) 22 Cal.App.3d 714, 717–718.) Defense counsel complained that the arrest would prejudice the jury against the witness and the defendant, but did not move for a mistrial. (*Ibid.*) The court declared a mistrial on its own motion. (*Ibid.*) The reviewing court reversed. It reasoned, "It is manifest that under *Compton* consent may not be implied solely from defense counsel's initiation of the inquiry and assertion of prejudice. The refusal of both appellant and his counsel to move for the mistrial, or to consent thereto, negates any possible inference of *consent* and we so conclude." (*Id.* at

p. 718; accord *People v. Chaney* (1988) 202 Cal.App.3d 1109, 1113–1114, 1117–1118 [no implied consent where counsel remained silent when the court outlined its planned juror inquiry, remained silent when the prosecutor agreed to that plan, and remained silent when court said, " 'If you don't want me to [declare a mistrial] . . . you let me know' " even though counsel also made remarks that "clearly anticipated a mistrial might well be granted" such as asking the court to poll the jury " 'if the court declares a mistrial.' "]; *Hutson v. Superior Court* (1962) 203 Cal.App.2d 687, 692–693 [no implied consent where, "after the court had stated positively that it would grant a mistrial[,]" but before it did so, defense counsel told the prosecutor, " 'It's been a mistrial. You can file a new complaint.' "].)

In *People v. Allen*, on the other hand, the court found implied consent from defense counsel's affirmative conduct. (*People v. Allen* (1980) 110 Cal.App.3d 698.) In that case, the jury had reached a not-guilty verdict on the charged offense of first-degree murder but was deadlocked on the lesser-included offense of second-degree murder. (*Id.* at pp. 700–702.) Defense counsel urged the court to record the partial verdict and agreed that it would be " 'up to the district attorney's office . . . whether they will retry' " the defendant for the lesser-included offense. (*Id.* at p. 704.) Upon retrial, the defendant entered a successful plea of prior acquittal, and the People appealed. The court held that defense counsel impliedly consented to the retrial of the lesser-included offense. (*Ibid.*; see also *People v. Mills* (1978) 87 Cal.App.3d 302, 310–311 [defense counsel's persistent, strident assertions of prosecutorial misconduct and argument that dismissal was the "only appropriate remedy" implied consent to mistrial].)

Stanley I departed from this body of law in two ways—first, by imposing a new duty on defense counsel not to remain silent under circumstances that could mislead the court, even unintentionally, about whether he consented to a mistrial, and second, by holding that multiple instances of ambiguous silence, taken together, could constitute the sort of "affirmative conduct" that "clearly evidences consent" under *Curry*. (*Curry*, *supra*, 2 Cal.3d at p. 713.) In so doing, *Stanley I* did not "explain or refine the holding of a prior case, . . . apply an existing precedent to a different fact situation, . . . [or] draw a conclusion that was clearly implied in or anticipated by previous opinions." (*People v. Guerra* (1984) 37 Cal.3d 385, 399.) Instead, *Stanley I* departed from "a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities" and "impliedly sanctioned by prior decisions of" the California Supreme Court (*People v. Guerra*, at p. 401)—namely, that a criminal defendant could *always* preserve a claim of once in jeopardy by remaining silent in the face of an unnecessary mistrial. Thus, I conclude that *Stanley I* established "a 'new' rule or standard[.]" (*Donaldson v. Superior Court*, *supra*, 35 Cal.3d at p. 37.)

3.2. The equities favor prospective application of *Stanley I*.

Having concluded *Stanley I* adopted a new rule, I next explain why principles of notice, equity, and reliance compel this court to restrict that rule's retroactive application in this case. (See *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888–889; *People v. Welch*, *supra*, 5 Cal.4th at pp. 237–238 & fn. 5; *People v. Scott*, *supra*, 9 Cal.4th at pp. 356–358 & fn. 19; *People v. Birks*, *supra*, 19 Cal.4th at pp. 136–137.) Stanley contends that

because *Stanley I* imposed affirmative obligations on defense counsel where none had existed before, it would be unfair to apply the new rule to actions counsel took in reliance on the old one. The People argue that *Stanley I* did not adopt a new rule, that reliance considerations are only relevant in civil cases, and that in any event, counsel's ethical obligations required him to speak.[13] The majority does not address either party's arguments. I conclude Stanley is correct.

3.2.1. Learned treatises did not place counsel on notice of the rule announced in *Stanley I*.

As discussed, before *Stanley I*, published double jeopardy cases uniformly held that a defendant's silence could not imply consent to a mistrial in California. This rule was duly reported in popular treatises and practice guides. For example, one guide—often referred to as the Bible of criminal practitioners in this State—emphasized that "a defendant has no duty to object to

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[13] I concluded *ante* that *Stanley I* adopted a new rule. As to the People's second argument, retroactivity rules in civil and criminal cases turn on the same considerations of fairness and public policy. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151–157; accord *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372; see, e.g., *Johnson v. Department of Justice*, *supra*, 60 Cal.4th at pp. 888–889 [applying rule from civil case in determining there was no reason to deny retroactive application where criminal defendant did not justifiably rely on prior decision]; *People v. Trujeque* (2015) 61 Cal.4th 227, 249 [noting, in retroactivity context, that the " ' "guarantee against double jeopardy is significantly different from [the constitution's] procedural guarantees" ' "].) I address the ethics contention *post*.

the declaration of a mistrial not sought by him or her; thus his or her silence *cannot be deemed consent* or invited error that would waive the constitutional protection against double jeopardy." (Cal. Criminal Law Procedure and Practice (Cont.Ed.Bar 2013) § 26.27, p. 753, emphasis added; see also, 1 Torcia, Wharton's Criminal Law (15th ed.) Former Jeopardy, § 55 [suggesting that in California, a judge may declare a mistrial "only in response to a motion made by the defendant"], § 63 [noting "a defendant's silence or failure to object to the trial judge's discharge of the jury is not deemed a consent thereto."]; 19 Cal.Jur.3d. (2016) Criminal Law: Defenses, § 86 ["An accused has no duty to object to the court's declaration of a mistrial. Moreover, the mere fact that neither the accused nor the accused's counsel does so cannot result in a waiver of the defense of double jeopardy, notwithstanding that the error causing the mistrial was invited by defendant's counsel."].) Judicial education materials agreed that an unnecessary mistrial was "nonforfeitable error." (Hoffstadt, *To Object or Not to Object: What is the Consequence?*, Daily J. (Feb. 2012) <https://www.dailyjournal.com/mcle.cfm?ref=article&eid=920992&evid=1&qVersionID=372&qTypeID=8&qSPCtypeID=17&qcatid=13 > [as of Dec. 6, 2016].) Indeed, I have not uncovered any secondary source that advised counsel that silence *could* support a finding of implied consent.

"An attorney is not required to be clairvoyant. As a matter of common sense, an attorney is not required to raise an argument based on an as-yet-to-be-filed opinion." (*In re Richardson* (2011) 196 Cal.App.4th 647, 661.) Before *Stanley I*, a competent, diligent criminal defense attorney could reasonably conclude that remaining silent in the face of an unnecessary mistrial would *always* preserve a later plea of once in jeopardy

for his client. Because *Stanley I* changed the rules of the game, its holding should not be applied retroactively to Stanley. (See *People v. Scott*, *supra*, 9 Cal.4th at pp. 357–358 & fn. 19 [because court's adoption of new waiver rule was contrary to existing case law, treatises, and secondary authorities, holding would be applied prospectively]; *People v. Welch*, *supra*, 5 Cal.4th at p. 238 & fn. 5 [concluding, based in part on the fact that at least one practice guide advised no objection was required, that equitable and orderly administration of the law required court to apply new waiver rule prospectively and declining to apply new rule to defendant or any other litigant whose probation conditions were imposed before the new decision became final].)

3.2.2. Ethics requirements did not place counsel on notice of the rule announced in *Stanley I*.

The People appear to argue that even if governing case law and secondary authorities all assumed that silence could not imply consent to a mistrial, ethics rules nevertheless prohibited the silence in this case. Because all attorneys have an ethical obligation not to mislead the court, they contend, *Curry* and its progeny cannot "stand for the premise that defense counsel has no duty to correct a trial court's erroneous belief that counsel has consented to a mistrial." At its heart, this argument conflates an ethical issue—counsel's pre-*Stanley I* obligation not to *deceive* the court—with *Stanley I*'s new rule that defense counsel must affirmatively correct the court's mistaken beliefs, even if counsel did not cause the confusion.[14]

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[14] The People attempt to square this circle by arguing that though *Curry* and its progeny allow a defense attorney to remain

"The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." (ABA Stds. for Crim. Justice (4th ed. 2015), The Defense Function, std. 4-1.2(b) [hereafter, ABA Stds.].) Certainly, defense attorneys may not "intentionally" "seek to mislead" the court. (Bus. & Prof. Code, § 6068, subd. (d) [attorney has a duty "never to *seek to mislead* the [tribunal] by an artifice or false statement of fact or law."], emphasis added; Rules Prof. Conduct, rules 5-200(B) [attorney "[s]hall not *seek to mislead* [the tribunal] by an artifice or false statement of fact or law"], 5-200(C) [attorney "[s]hall not *intentionally* misquote" authority], 5-200(D) [attorney "[s]hall not, *knowing its invalidity*, cite" invalid authority], emphasis added; ABA Stds., *supra*, std. 4-1.2(f) ["Defense counsel should not *intentionally misrepresent* matters of fact or law to the court."], emphasis added.) But to violate these rules, counsel must act affirmatively, with wrongful intent. It is an attorney's "affirmative misrepresentation [that] creates a duty of full disclosure[;] while mere silence is not concealment unless a preexisting duty to disclose exists." (*Crayton v. Superior Court* (1985) 165 Cal.App.3d 443, 451.) Without an initial misrepresentation, therefore, counsel's silence is insufficient.

The People contend that passive silence can nevertheless constitute the active, intentional misrepresentation contemplated by the ethics rules. The courts, however, have not construed

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silent *after* he affirmatively expresses opposition to the mistrial, they do not allow him to decline to offer an opinion in the first instance or to remain silent generally.

silence so broadly. In each case cited to us, counsel "engaged in an affirmative presentation of facts to obtain judicial action and concealed material facts of which he knew the [tribunal] was not otherwise aware. Under these circumstances, the making of affirmative representations itself created the duty to also disclose other material facts that counsel knew were unknown to [the court]." (*Crayton v. Superior Court*, *supra*, 165 Cal.App.3d at p. 451.)

For example, in *United States v. Thoreen*, the court held a defense attorney in criminal contempt for secretly replacing his client with a third party at counsel table in effort to trigger a misidentification. (*United States v. Thoreen* (9th Cir. 1981) 653 F.2d 1332, 1336.) Throughout the proceedings, defense counsel misrepresented the substitute as his client, while the real defendant sat in the gallery with the press. (*Ibid.*) The Ninth Circuit concluded that although "vigorous advocacy by defense counsel may properly entail impeaching or confusing a witness, even if counsel thinks the witness is truthful, and refraining from presenting evidence even if he knows the truth," defense counsel's action fell outside this protected realm of behavior. (*Id*. at pp. 1338–1339.)

The People's reliance on *Sullins v. State Bar* (1975) 15 Cal.3d 609 is also inapt. In that case, an attorney concealed material evidence that could have affected the court's decision. (*Id*. at p. 614.) The attorney represented the executor of an estate in a probate action between the executor and the decedent's daughter. (*Id*. at pp. 614–615.) The decedent's will designated her nephew as the sole recipient of her house. (*Id*. at p. 614.) The attorney mailed the nephew a letter to notify him of the bequest. (*Id.* at p. 615.) The nephew replied by notarized

letter, explained that he renounced his claim to the house, and expressed his belief that the decedent's daughter should be her sole beneficiary. (*Ibid*). The attorney did not reply to the letter and failed to disclose its contents to the daughter or to the court. (*Ibid.*) He later sought and secured court approval of an increase in his contingent fee in the action to set aside the conveyance, representing that the matter was—and would continue to be—vigorously contested. (*Id.* at pp. 615–616.) When the daughter's attorney finally brought the letter to light four years after it was written, the court removed counsel for the executor. (*Id.* at pp. 616–617.) The reviewing court affirmed the removal order. (*Ibid.*) The Supreme Court concluded the attorney "intentionally misled the court" and affirmed the State Bar's disciplinary action. (*Id.* at pp. 621–622.)

Stanley I, by contrast, did not identify any intentional deception. Instead, the opinion rested on the broader conclusion that counsel knew *or should have known* the court was confused. The court's confusion, in turn, stemmed in part from defense counsel's silence in the wake of the *prosecutor's* statements—silence that was misleading only insofar as counsel failed to remedy the prosecutor's error about the number of remaining alternates or to express an opinion about the prosecutor's stated preferences. Whatever the merits of *Stanley I*'s conclusion that defense counsel's silence under these circumstances implied consent to the subsequent mistrial, his silence certainly did not violate his duty of candor to the court.

The Sixth Amendment compels this conclusion. " 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent

go free.' [Citation.] It is that 'very premise' that underlies and gives meaning to the Sixth Amendment." (*United States v. Cronic* (1984) 466 U.S. 648, 655–656.) If the adversarial "process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." (*Id.* at pp. 656–657.) Accordingly, to " 'satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court'[.]" (*Id.* at fn. 17.)

While "the Sixth Amendment does not require that counsel do what is impossible or unethical[]" (*United States v. Cronic*, *supra*, 466 U.S. at fn. 19), requiring counsel to correct the prosecutor's misstatements is a bridge too far. Such a requirement would undermine the " 'very premise of our adversary system of criminal justice[.]' " (*Id.* at p. 655; see ABA Stds., *supra*, std. 4-1.2(a) [counsel "for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge . . . , counsel for the prosecution, and counsel for the accused."].) I therefore conclude that defense counsel reasonably relied on the prior rule notwithstanding his duty of candor to the court.

3.3. Under then-binding precedent, Stanley did not impliedly consent to a mistrial.

Having concluded that I would not retroactively apply *Stanley I* to Stanley, I next evaluate his double jeopardy claim under the governing case law prior to *Stanley I*.

Since this case does not involve manifest necessity or express consent, I examine counsel's "affirmative conduct" to determine whether it "clearly evidences [implied] consent." (*Curry*, *supra*, 2 Cal.3d at p. 713.) Because counsel has no duty

to disclose to the court that "it is about to err in a manner that sets up a double jeopardy defense" (*People v. Overby*, *supra*, 124 Cal.App.4th at p. 1244), his silence cannot constitute consent to a subsequent mistrial. (See *Crayton v. Superior Court*, *supra*, 165 Cal.App.3d at p. 451 ["affirmative misrepresentation creates a duty of full disclosure, while mere silence is not concealment unless a preexisting duty to disclose exists].)

Based on *Upshaw*, *Compton*, and *Chaney*, defense counsel's actions in this case did not clearly evidence consent. (*Upshaw*, *supra*, 13 Cal.3d 29; *Compton*, *supra*, 6 Cal.3d 55; *Chaney*, *supra*, 202 Cal.App.3d 1109; see "clearly, *adv.*" OED Online. Oxford University Press. <http://www.oed.com/view/Entry/34093?redirectedFrom=clearly> [as of Dec. 6, 2016] [defining *clearly* as "Manifestly; evidently" and "thoroughly; completely; unreservedly, entirely"].) Defense counsel's only affirmative conduct—a statement to the prosecutor about his "only problem" with continuing the trial for two days to accommodate Juror 6—is insufficient to manifestly or unreservedly imply consent to a mistrial, especially in light of his subsequent statement that he was "unhappy with the way things proceeded this morning[.]" On this record, and under the formerly-applicable legal rules, I discern no clear evidence of implied consent. I would therefore hold that Stanley's second trial violated the Double Jeopardy Clause of the California constitution.

In reaching this conclusion, I note that the prosecution was "not deprived of its 'one complete opportunity to convict those who have violated [the] laws.' [Citations.]" (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 77–78.) To the contrary, "the prosecution bears at least partial responsibility" for the mistrial in this case. (*Ibid.*; see *Stanley I*, *supra*, 206 Cal.App.4th at

pp. 273–274 & fn. 10–11.) "The consequences of an irregular verdict are well settled, and nothing precludes the prosecution from calling the deficiency to the court's attention before it discharges the panel. (See [Pen. Code,] §§ 1161–1164.) Since any failure to do so results from neglect rather than lack of notice and opportunity to be heard, the People's right to due process is accordingly not offended. (See *United States v. Jorn*, *supra*, 400 U.S. at p. 486; *United States v. Ball* [(1896) 163 U.S. 662,] 668 [prosecutor cannot " 'take advantage of his own wrong' "]; see also *Brown v. Ohio* (1977) 432 U.S. 161, 165 [double jeopardy guaranty "serves principally as a restraint on courts and prosecutors"].)" (*Marks*, *supra*, 1 Cal.4th at pp. 77–78, alterations in *Marks*.)

Certainly, I am mindful that such a holding would result in the reversal of a judgment of conviction for serious crimes. However, "we do not deal here with a mere technicality of the law." (*Curry*, *supra*, 2 Cal.3d at p. 718). "The United States Supreme Court has repeatedly counseled against subjecting a defendant to further proceedings to allow the prosecution the opportunity to ameliorate trial deficiencies, evidentiary or procedural, that could have been otherwise timely corrected. [Citations.]" (*Marks*, *supra*, 1 Cal.4th at p. 77.) " 'Assuming a failure of justice in the instant case, it is outweighed by the general personal security afforded by the great principle of freedom from double jeopardy. Such misadventures are the price of individual protection against arbitrary power.' " (*Curry*, *supra*, at p. 718.)

4. It is manifestly unjust to apply law of the case here.

In light of the majority's conclusion that the rule announced in *Stanley I* applies retroactively, I turn to the

question of whether there are good reasons not to follow *Stanley I* despite law of the case.

"The principal reason for the [law of the case] doctrine is judicial economy. 'Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding.' [Citation.] Because the rule is merely one of procedure and does not go to the jurisdiction of the court [citations], the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice' (*Shuey*, *supra*, 13 Cal.3d at p. 846), or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation]." (*People v. Stanley*, *supra*, 10 Cal.4th at pp. 786–787; see *People v. Scott* (1976) 16 Cal.3d 242, 246–247 [declining to apply law of the case where prior opinion misapplied binding precedent].)

The law-of-the-case doctrine "is a prudential one." (Garner, et. al, The Law of Judicial Precedent (2016) p. 487.) The principles governing its use "are meant to be a 'guide to discretion,' and not 'a set of categorical rules, mechanically applied.' " (*Ibid.*; see *Citizens United v. Federal Election Comm'n* (2010) 558 U.S. 310, 378 (Roberts, C.J. concurring) ["When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."].) Thus, courts may—and typically do—exercise their discretion to disregard the law-of-the-case doctrine when justice requires it.

"When it comes to a court's *discretion* to change its mind about an earlier ruling, it is fair to ask how often courts insist on clear error and manifest injustice before reconsidering a prior ruling. It is a rare court . . . that concedes its prior ruling to have been wrong—not clearly wrong, just wrong—yet is unwilling to correct the earlier ruling. . . . What appellate court on direct review is going to uphold a mistaken first decision on the ground that it was later shown only to be wrong but not clearly wrong? None, to our knowledge. After all, it isn't an abuse of discretion under the law-of-the-case doctrine to put aright an erroneous prior ruling." (Garner, *supra*, The Law of Judicial Precedent, at p. 447.)

As I have discussed, *Stanley I* misapplied and disregarded binding precedent, redefined "affirmative conduct" to include passive silence, concluded that ambiguous silence could clearly evidence consent to a mistrial, applied the new rules without notice to a defendant who had plainly relied on the old ones, and created a hierarchy of double jeopardy violations. I would hold that any one of these issues, standing alone, compels us to set *Stanley I* aside—though fair-minded jurists could perhaps disagree. Taken together, any disagreement becomes harder to understand. But when combined, as these errors are, with the usurpation of the jury's fact-finding role, resulting in suppression of a criminal defendant's right to offer a complete defense to a double homicide, there is only one right answer.

In this case, the trial court erroneously rejected Stanley's proffered plea of once in jeopardy, thereby barring him from a jury determination of any disputed factual issue. Defense counsel objected, but before *Stanley I*, the disputed facts would not have mattered; Stanley was entitled to a dismissal as

a matter of law. Accordingly, he petitioned for a writ of mandate directing the trial court to dismiss the case. Once he discovered the law had changed and the disputed facts *did* matter, it was too late. Instead of ordering the trial court to enter the plea so the jury could resolve the question of implied consent, the prior panel elected to appropriate the role of trier of fact, disregard counsel's supplemental declarations, deny Stanley's request for an evidentiary hearing, and resolve the disputed factual issues itself. By usurping the jury's role in this manner, the prior panel deprived Stanley of his federal constitutional right to present a defense and his state right to present that defense to a jury. *Stanley I*'s constitutional errors compel this court to exercise its discretion to set things right.

In the face of these troubling issues of notice, reliance, stare decisis, and constitutional rights raised by this case,[15] the majority elects to quote *Stanley I* for the proposition that we should follow *Stanley I*. (Maj. opn., at pp. 24, 25.)[16] Then, it

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[15] In light of its view that *Stanley I* implicitly decided the retroactivity question, the majority concludes it need not decide whether it is fair to apply *Stanley I* to Stanley. I therefore emphasize that the views I expressed in the retroactivity section apply equally to why it is manifestly unjust to apply the law-of-the-case doctrine here.

[16] Indeed, the quote it chooses exemplifies *Stanley I*'s problems. *Stanley I* cited *Ohio v. Johnson* (1984) 467 U.S. 493, 502 for the proposition that there was no government overreach in this case because the mistrial was "just an attempt by the trial court to conserve judicial resources when it became reasonably apparent" that the jury was "unlikely" to last for the entire trial.

reduces the double jeopardy violation in this case to a matter of harmless error.

4.1. The attachment of jeopardy is a core principle of the Double Jeopardy Clause.

In choosing to apply *Stanley I*, the majority suggests that the attachment of jeopardy is not a core principle of double jeopardy jurisprudence. I disagree.

For more than half a century, the Supreme Court has repeated the same "bright-line rule": "Jeopardy attaches when 'a defendant is "put to trial," ' and in a jury trial, that is 'when a jury is empaneled and sworn.' [Citation.]" (*Martinez v. Illinois* (2014) 134 S.Ct. 2070, 2075 (per curiam).) The moment when

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(Maj. opn., at p. 24, quoting *Stanley I*, *supra*, 206 Cal.App.4th at p. 290.) As I discussed above, since the *defendant's* welfare is not a sufficient basis for an unnecessary mistrial, conservation of judicial resources is *certainly* not an adequate reason to dispense with the Double Jeopardy Clause. (See, e.g., *Larios v. Superior Court*, *supra*, 24 Cal.3d at pp. 329–332 [existence of good cause to replace a juror if an alternate *were* available does not mean that there is also a legal necessity for a mistrial where *no* alternate is available]; *Curry*, *supra*, 2 Cal.3d at pp. 717–718 [concern for defendant's welfare insufficient].) *Ohio v. Johnson* does not hold otherwise; it addresses an entirely different issue. There, the Court held that while the Double Jeopardy Clause protected a defendant against cumulative punishments for convictions on the same offense, the clause did not prohibit the state from *prosecuting* the defendant for multiple offenses in a single prosecution. Thus, under the federal constitution, defendant's guilty plea on a lesser-included offense did not bar continued prosecution on the remaining counts.

jeopardy attaches is " 'by no means a mere technicality, nor is it a "rigid, mechanical" rule.' [Citation.]" (*Ibid.*)

To the contrary, it is the very " 'lynchpin for all double jeopardy jurisprudence.' " (*Crist v. Bretz* (1978) 437 U.S. 28, 38.) "It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns—the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury—have combined to produce the federal law that . . . in a jury trial jeopardy attaches when the jury is empaneled and sworn." (*Id.* at pp. 37–38.) At that moment, the risks of injury to a defendant are so great that the government should have to shoulder the heavy burden of showing manifest necessity for repetitious proceedings. That moment matters. (See *Martinez v. Illinois*, *supra*, 134 S.Ct. at p. 2072.)[17]

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[17] The majority cites only inapt authority in support its view that *Stanley I* does not offend the "core principles" of the Double Jeopardy Clause. *People v. Eroshevich* (2014) 60 Cal.4th 583 involved a retrial following a trial court's erroneous grant of a new trial motion based in part on insufficiency of the evidence *after* the jury had returned a guilty verdict. The opinion emphasizes that had these actions occurred before the verdict, double jeopardy would have barred a retrial. (*Id.* at pp. 588–590.) *Tibbs v. Florida* (1982) 457 U.S. 31 involved the difference between a post-trial acquittal based on the weight versus the sufficiency of the evidence. The quoted language explains why retrial is allowed following a successful appeal based on legal errors.

4.2. Stanley was entitled to a jury trial on all disputed factual issues.

"Under California law, a defendant may not mount a double jeopardy defense of any kind under a plea of not guilty. [Citations.] In order to present a double jeopardy defense at trial, a defendant must first have entered a special plea of 'former acquittal,' 'former conviction' or 'once in jeopardy.' [Citations.] These pleas are favored by the law due to the importance of the double jeopardy rights they are employed to protect. [Citations.]

"Once the defense of former jeopardy has been raised by special plea, it is generally 'an issue of fact . . . which the jury alone possesse[s] the power to pass upon.' [Citation.] Consequently, when a defendant asserts former jeopardy as a defense at trial, 'he is entitled to a resolution by the jury of any material issues of fact raised by the claim.' " (*People v. Bell* (2015) 241 Cal.App.4th 315, 339–340 (*Bell*); see Pen. Code, § 1020.) These rights are so important that a trial court has no discretion to reject a legally sufficient jeopardy plea. (See Pen. Code, § 1016, subd. (3) [defendant may enter any plea without the court's consent except a plea of no contest]; *People v. Blau* (1956) 140 Cal.App.2d 193, 215 [plea that failed to state time, place, and court of former jeopardy was legally insufficient].)

The majority's final explanation for exercising its discretion to apply law of the case is the denial of review in *Stanley I*. It is hornbook law, however, that the Supreme Court's " 'refusal to grant a hearing in a particular case is to be given *no* weight[,]' " particularly where, as in this case, the " 'opinion is in conflict with the law as stated by [the supreme] court.' " (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 287, fn. 1.)

If the facts underlying the jeopardy plea are undisputed *and* there is only one inference to be drawn from those undisputed facts, former jeopardy can become a question of law that the court may resolve on a motion to strike the plea. (*Bell*, *supra*, 241 Cal.App.4th. at p. 341.) "If, however, a material issue of fact exists, then it is for the jury to resolve." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 509, fn. 1.) Put another way, entry of a plea of once in jeopardy triggers a criminal defendant's right to a jury determination of any disputed factual issues attendant to the plea. (*Bell*, *supra*, at pp. 338–341; Pen. Code §§ 1041 ["An issue of fact arises: . . . 3. Upon a plea of once in jeopardy."], 1042 ["Issues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state."]; Cal. Const., art. I, § 16 ["Trial by jury is an inviolate right and shall be secured to all . . . . A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."].)

Here, Stanley proffered a legally adequate plea of once in jeopardy and moved to dismiss the charges. After finding defense counsel had impliedly consented to dismissal of the jury and the resulting mistrial, the trial court denied the motion. Defense counsel then attempted to enter the once-in-jeopardy plea a second time, and specifically asserted the jury trial rights that flow from the plea. The trial court nevertheless rejected the proffered plea—a step it had no authority to take—and invited the court of appeal to sort it out.

The *Stanley I* court did not sort it out, however. *Stanley I* refers to the plea only in passing, when it notes, "defendant added a plea of once in jeopardy." (*Stanley I*, *supra*, 206 Cal.App.4th at pp. 270, 277 ["defendant added a plea of once

in jeopardy and moved to dismiss the prosecution."].) The opinion does not mention the trial court's actions at all. The prior panel appears to have believed that Stanley successfully entered the plea, thereby triggering a jury determination of any disputed issues of fact. The issue before the prior panel, therefore, was a legal one.

4.3. *Stanley I* resolved disputed factual issues.

Why, then, did the *Stanley I* court chose to resolve the facts itself, thereby denying Stanley the right to present his double jeopardy defense at trial? Faced with a legal issue, why did the court deny Stanley's request for an evidentiary hearing and make its own factual findings on the disputed issues? Whatever the reasons, the appellate courts are not natural fact finders—and the *Stanley I* court approached its task haphazardly.

In some places, *Stanley I* treats the trial court as the trier of fact. For example, *Stanley I* deferred to the trial court "as the trier of fact" and emphasized that "the court was able to rely on its own recollection of the proceedings, including body language, tones of voice, nods, and so forth" to conclude Stanley impliedly consented to the mistrial. (*Stanley I*, *supra*, 206 Cal.App.4th at p. 291; see *id.* at pp. 291–292 & fn. 37.) And although *Stanley I* does not explicitly disclose the standard of review used in that opinion, the panel appears to have applied a sufficiency of the evidence test.[18] (See, e.g., *Stanley I*, at p. 270 [circumstances

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[18] This standard of review, of course, is applied only to a trial court's rulings on *disputed* facts. Legal conclusions based on undisputed facts are reviewed de novo. (See *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.)

"were sufficient to cause the court to harbor a reasonable belief that counsel had consented"].) That is, even though the trial court's authority extended only to legal conclusions based on undisputed facts (*Bell*, *supra*, 241 Cal.App.4th at pp. 339–341), *Stanley I* deferred to express and implied factual findings the trial court had no authority to make.

Elsewhere, the opinion reveals that the prior panel assumed the role of fact-finder itself. (See, e.g., *Stanley I*, *supra*, 206 Cal.App.4th at p. 271 [finding it significant that "counsel did not ask the court to repeat what he now states he had failed to hear."], p. 272, fn. 4 [concluding the record "strongly suggests" the court intended to excuse Juror 4], p. 273, fn. 7 [speculating that jurors may have had prepaid travel plans], fn. 10 [concluding defense counsel's understanding of the court's comments was "unpersuasive" and "difficult to believe" and that there was a "rather more likely" way to interpret the comments], p. 275, fn. 12 [concluding, based on counsel's failure to object during the court's monologue to the jury, that the "record strongly implies that defense counsel agreed with the court's procedure."], p. 276, fn. 16 [speculating that Juror 2 might have needed a medical procedure and that this "medical procedure . . . might have been scheduled for one of the extended trial dates."], p. 277 [concluding prosecutor's preferences became part of the agreement, a conclusion that contradicts the trial court's factual findings], p. 279, fn. 22 ["It appears to us, however, that the record indicates the agreement between the parties was an agreement for dismissal of the entire panel, not simply Juror 2 [heart attack]. We therefore elect to consider the parties' agreement in terms of an implied consent to the mistrial itself, rather than an agreement to the dismissal of the fifth juror, which created

a legal necessity for the mistrial."], pp. 288–289 [interpreting defense counsel's possibly-ambiguous statements, particularly his comment that his "only problem" was making sure his expert could testify].)

The prior panel also found itself musing on the trial court's mental state. (See, e.g., *Stanley I*, *supra*, at p. 270 [counsel's conduct was "sufficient to cause the court to harbor a reasonable belief that counsel had consented [to the mistrial]. . . . [T]his was sufficient, under all the circumstances, to constitute implied consent."], p. 275, fn. 11 [speculating about the court's interpretation of counsel's failure to respond to the prosecutor's statements of preference], p. 293 [same], p. 276, fn. 17 ["The court's frustration and resignation are certainly understandable. The court had very likely expected that the juror who raised his hand would state an inability to serve during Thanksgiving week due to holiday travel plans"].) Then, it rested its holding in large measure on what it believed defense counsel should have inferred about the trial court's subjective understanding of the proceedings.

In short, when considering the legal issue before it, the *Stanley I* court did not limit itself to undisputed facts.

4.4. By usurping the role of fact-finder, the prior panel denied Stanley the federal constitutional right to present a defense.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution

guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; see *Washington v. Texas* (1967) 388 U.S. 14, 19 [discussing fundamental nature of Compulsory Process Clause].)

A defendant's "right to present relevant evidence is not unlimited," however, and at times must "bow to accommodate other legitimate interests in the criminal trial process[.]" (*United States v. Scheffer* (1998) 523 U.S. 303, 308.) Thus, this state may require a defendant to follow a particular procedure before allowing him to present a former-jeopardy defense at trial. (See, e.g., *People v. Barry* (1957) 153 Cal.App.2d 193 [plea of not guilty does not raise the issue of former jeopardy]; *People v. Bennett* (1896) 114 Cal. 56 [defenses, such as former acquittal or jeopardy, must be raised in the manner provided by law].) Once the defendant has met the requirements, however, he must be allowed to proceed on any disputed factual issues.

That did not happen in this case. Nor did other procedural safeguards attend *Stanley I*'s fact-finding expedition. As noted above, when it became clear that the prosecution disputed the relevant facts, both sides submitted supplemental declarations, and Stanley requested an evidentiary hearing to resolve the issues. By that point, it should have been clear to the court that it did not face a purely legal issue. Nevertheless, the court struck the declarations and refused to hold a hearing. In support of its actions, the court cited a footnote from a California Supreme Court opinion. (*Stanley I*, *supra*, 206 Cal.App.4th at p. 278, fn. 21, citing *People v. Lavi* (1993) 4 Cal.4th 1164, 1173, fn. 5.) In that footnote, the Court had cautioned that "it 'is singularly inappropriate for appellate courts, which are not equipped to try

issues of fact [to do so].' " (*People v. Lavi*, *supra*, at p. 1173, fn. 5, alteration in *Lavi*.)

Then, when the opinion issued, Stanley requested rehearing based in part on the court's resolution of the disputed facts in a way not suggested by any party. At minimum, the petition demonstrated again that there were indeed disputed issues of fact. The court's conclusion that Stanley had "added" a plea of once in jeopardy required that these disputed issues be tried to a jury or resolved at an evidentiary hearing. Nevertheless, the court summarily denied both requests.

4.5. The issue is not forfeited.

The majority contends Stanley has not argued that the trial court erred in rejecting his plea. (Maj. opn., at fn. 4, 12.) Be that as it may, that narrow question is not before us. The question here is whether *Stanley I*'s usurpation of the jury's fact-finding role compels us to exercise our discretion to set aside a rule of judicial convenience, an issue that Stanley argues at length—and the majority declines to address.

In his opening and supplemental briefs, Stanley asks this court to reconsider *Stanley I*—in large part because that court resolved disputed factual issues. For example, he notes that "to find an implied waiver in this case, the *Stanley [I]* Court speculated as to the meaning of discussions in which mistrials were not even mentioned, [and] engaged in conjecture about what happened in the trial court in light of an ambiguous record." He specifically objected to *Stanley I*'s speculation about the meaning of counsel's failure to respond to the prosecutor's preferences. And he explained that "reviewing courts are not required (or permitted) to engage in such speculation."

Moreover, as the majority acknowledges, Stanley asks us to reconsider *Stanley I* in light of the Ninth Circuit's opinion in *Stanley II*. (Maj. opn., at fn. 11.) His reliance on that case further clarifies his argument here. That court, which follows the federal constitution's narrower Double Jeopardy Clause, found it was "unable to determine [from this record] whether mistrial was supported by implied consent." (*Stanley II*, *supra*, 555 Fed.Appx. at pp. 708–709.) Although it had the benefit of *Stanley I*'s factual analysis, the Ninth Circuit found it had questions that could only be resolved by a true trier of fact. "For example, it [was] unclear how much time passed between the dismissal of the jury and the declaration of mistrial, whether the jury could have been recalled had an objection been lodged immediately upon declaration of mistrial, and whether defense counsel heard the state trial court refer to an agreement that trial would not go forward without at least one alternate juror." (*Ibid.*)[19]

The Ninth Circuit also noted that the record in this case allowed for some *unreasonable* factual determinations: "In this case, there is no evidence that the state trial court concluded that jurors' asserted hardships had fatally undermined their ability to discharge their responsibilities diligently and impartially. No such conclusion would have been reasonable." (*Stanley II*, *supra*, 555 Fed.Appx. at p. 708.) The only reasonable conclusion to be gleaned from these passages, is that the Ninth Circuit recognizes that the prior panel imprudently, and improperly resolved issues that were properly reserved for the trier of fact.

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[19] *Stanley I*, of course, explicitly resolved the last of these disputed issues.

The Ninth Circuit is correct. *Stanley I*'s resolution of disputed factual issues and usurpation of the jury's fact-finding role rendered the trial court's error irredeemable. By the time *Stanley I* was through, there was nothing left for a jury to decide.

CONCLUSION

I end by noting that the "history of liberty has largely been the history of observance of procedural safeguards." (*McNabb v. United States* (1943) 318 U.S. 332, 347.) For many criminal defendants, the state appellate courts are the last guardians against constitutional violations. Regrettably, that is not the case today. I urge the federal courts not to overlook these violations and, at a minimum, to provide Stanley with the evidentiary hearing he has never received.

LAVIN, J.